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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

**No. 334**

VITO F. LANZA and CHARLES F. RANK,
*Petitioners,*

*against*

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI

VITO F. LANZA,
32 Court Street,
Brooklyn 1, N. Y.,
TR 5-1100
*Counsel for Petitioners.*

SAMUEL SHAPIRO,
*of Counsel.*

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IN THE

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OCTOBER TERM, 1961.

No. .....

VITO F. LANZA and CHARLES F. RANK,

*Petitioners,*

*against*

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO EITHER OR BOTH OF THE SUPREME COURT OF THE STATE OF NEW YORK AND THE COURT OF APPEALS OF THE STATE OF NEW YORK

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of Vito F. Lanza and Charles F. Rank, for a writ of certiorari to either or both of the Supreme Court of the State of New York and the Court of Appeals of the State of New York, respectfully shows:

### I.

### Judgments Sought to Be Reviewed

The petitioners seek review of the judgments and order as follows:

(A) The final judgment of the Supreme Court of the State of New York, in and for the County of Kings, entered on October 11, 1961, which dismissed the petitioners complaint.

(B) The final judgment of the Supreme Court of the State of New York, in and for the County of Kings, entered on January 4, 1962, which after appeal to the Appellate Division of said court, affirmed the dismissal of the petitioners complaint.

(C) The order of the Court of Appeals of the State of New York entered in said court on May 17, 1962, which by a divided [4 to 3] court modified both said judgments to the extent of directing judgment in favor of respondents declaring that the New York State Statute, which was the subject of the action in which said judgments and order were entered, is constitutional and adjudging that it was proper for the respondent Mayor of the City of New York to appoint new members to the Board of Education, in accordance with the provisions of said Statute.

## II.

## Opinions In the Courts Below

The opinions of the Supreme Court of the State of New York, Misc. 2d and 30 Misc. 2d 212 were respectively handed down on September 19, 1961 and September 25, 1961.* The decision of the Appellate Division of said Supreme Court, 15 A.D. 2d 552 was handed down on December 21, 1961.* The opinion of the Court of Appeals of the State of New York 11 N. Y. 2d 317 was handed down on May 17, 1962*.

The said opinions and decision are made part of this petition. The opinions of said Supreme Court are respectively Appendix 1 and Appendix 2. The decision of the Appellate Division is Appendix 3. The opinion of the Court of Appeals is Appendix 4.

*Unreported when this goes to print.

## III.

### Jurisdictional Statement

Jurisdiction is invoked under the United States Code, Title 28 § 1257(3), which as here pertinent, provides,

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, * * * of the United States, * * *.

## IV.

### Constitutional and Statutory Provisions

The rights claimed under the Constitution of the United States, and the provisions of the Constitution involved, are as follows:

Article 1, § 10. No State shall * * * pass any Bill of Attainder, * * *.

Article 4, § 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and * * *.

Amendment XIV.-§ 1. * * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York State Statute, being Chapter 971, of the Laws of 1961 is set forth in full as Appendix 5.

This petition is timely filed within the ninety day period prescribed by law. United States Code, Title 28, § 2101(c). The order of the Court of Appeals of the State of New York

is dated May 17, 1962. The respondents have not entered judgment on said order.

Petitioners were today informed that whereas the Clerk of the Court of Appeals of the State of New York on May 23, 1962 sent the Remittitur to the Corporation Counsel of the City of New York, the Remittitur has not yet been filed with the Clerk of said Supreme Court. Petitioners, on assumption that the Remittitur had been filed, have many times demanded that respondents enter judgment pursuant to the opinion of the Court of Appeals. The Corporation Counsel has moved by notice returnable on August 16, 1962 to enter judgment in the said Supreme Court in accordance with the order of the Court of Appeals of the State of New York. Pending hearing and determination of such motion, petitioners have today filed with the clerk of said Supreme Court, their notice of appeal to the Supreme Court of the United States, to preserve their rights for review by this court. A copy of said notice of appeal is Appendix 6.

Because of the failure of the Corporation Counsel of the City of New York to file the said Remittitur, it is not possible to secure from the clerk of said Supreme Court a certified copy of the record. However, petitioners are to file a copy of the record, served on the respondents, with a certificate of the clerk of said Supreme Court, that there are no papers on file with him incident to the determination of the appeal by the Court of Appeals of the State of New York.

Said record which is to be filed with this petition, except as to the opinion and order of the Court of Appeals of the State of New York is a complete record of the action.

## V.

### Questions Presented for Review

The Federal questions of major constitutional importance arise under the provisions of the Constitution of the United States, as follows: Article 1, § 10; Article 4, § 4; and Amendment XIV, § 1, each of which is earlier set

forth verbatim, as concern the validity of the New York State Statute, being Chapter 971 of the Laws of 1961 [hereinafter called the New York State Statute]. Said New York State Statute is made part of this petition, as Appendix 5.

The questions presented for review may be tersely stated as follows:

(A) Whether said New York State Statute violates Article 1, § 10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any Bill of Attainder.

(B) Whether said New York State Statute violates Article 4 of the Constitution of the United States, insofar as said Article provides that the United States shall guarantee to every State a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV, § 1, of the Constitution of the United States, insofar as said Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

## VI.

## The Federal Questions Raised

Each and all of the questions sought to be reviewed, were raised by argument and briefs in the Supreme Court of the State of New York, in the Appellate Division of the Supreme Court and in the Court of Appeals in the State of New York. The opinions and decision clearly show that these questions were timely and properly raised. The said opinion and decision are respectively Appendices 1, 2, 3 and 4 made part hereof.

Each and all of the questions sought to be reviewed, in the Courts below, were determined adversely to petitioners. In the Court of Appeals in the State of New York, the determination was by a 4 to 3 opinion.

## VII.

### Statement of Case

Petitioners were members of the New York City Board of Education. They were legislated out of office by the New York State Statute, although their respective terms were to continue for some time. The New York City newspapers, had during the period in question, carried daily accounts of events leading to enactment of this statute. Request is made for submitting these excerpts from the press with this petition, as those excerpts were before the Court of Appeals of the State of New York.

Petitioner Lanza had been appointed for a seven year term beginning May 1948 and reappointed to a seven year term beginning May 1955. Petitioner Rank had been appointed for a seven year term beginning May 1950 and reappointed to a seven year term beginning May 1957.

The New York State Education Law § 306 and the New York City Charter § 523, provide for removal of a member of the Board of Education on charges of misconduct, on notice and hearing. It is conceded that as to both petitioners, there is no semblance of any suggestion of misconduct, and no charges were ever made against either of them.

During the hotly contested mayoralty campaign in the summer of 1961, "schools" became a political issue, and early in August the Mayor requested resignation of the entire Board of Education. Six members of the Board resigned, but three members including petitioners refused to resign.

Thereupon the New York State Statute was enacted. Insofar as here material, this Statute provided that the terms of office of the members of the Board were forthwith terminated, and for appointment of members of the Board of Education, by the Mayor, but *only* from a list of nominees

to be submitted to him by a Selection Board of 11 *private* persons holding named positions in named *private* organizations.

The Board of Education was continued as theretofore, with precisely the same duties, the same terms of office, the same number of members, and the same name. The only difference was that the Mayor instead of having an unlimited choice of selection, was now required to appoint the members from the list to be submitted to him by the Selection Board of 11 *private* persons.

In accordance with the New York State Statute, the Selection Board submitted to the Mayor a list of 26 nominees. It is conceded that none of the members of the Board as constituted immediately before the enactment of this Statute, was considered by the Selection Board for nomination.

On September 18, 1961 the Mayor appointed nine of the nominees of the Selection Board, to make up the Board of Education, and they took their respective oath of office.

Petitioners instituted their action in the Supreme Court for an adjudication that the New York State Statute was unconstitutional, and that they were to continue as members of the Board of Education until the expiration of their respective terms.

## VIII.

### Argument for Allowance of Writ

Each of the Federal questions, which are sought to be reviewed, would seem to warrant the allowance of a writ of certiorari.

#### As to Bill of Attainder

The New York State Statute inflicted punishment on petitioners, without a hearing, and therefore the Statute is void as being in violation of Article 1, § 10 of the Constitution of the United States.

A Bill of Attainder is a legislative act which inflicts punishment without a trial. *Cummings* v. *Missouri*, 4 Wall. 277, 323. A Statute, irrespective of its form, which applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a trial, is a Bill of Attainder. It is not requisite for a Bill of Attainder to pronounce a person guilty of a crime or to impose punishment in the form of fine or imprisonment. *United States* v. *Lovett*, 328 U. S. 303, 315.

The plain meaning of the New York State Statute is that petitioners were guilty of being lax in their duties and causing or permitting critical conditions to exist. Petitioners could have been removed on charges of misconduct, if there were such misconduct, after notice and hearing. Yet, no charges were ever preferred against petitioners. Instead, the Statute found petitioners guilty of serious charges without trial and removed them from office on the basis of this guilt.

The Statute clearly was a Bill of Attainder, and thus violative of the Constitution of the United States.

### As to Republican Form of Government

The New York State Statute is a delegation of legislative power to private persons holding named positions in named private organizations, and therefore the Statute is void as being in violation of Article 4, § 4 of the Constitution of the United States.

The Constitution of the United States guarantees to each State a Republican Form of Government. In essence, in a Republic, every holder of public office must derive directly or indirectly from the people. The New York State Statute, delegates the power to appoint members of the Board of Education, who are public officers, to private persons holding named positions in named private organizations.

Diligent research has not revealed a case of the United States Supreme Court, which is in point.

In the Court of Appeals in the State of New York, the majority opinion concedes that there is a diversity of opinion in State courts as to the validity of Statutes, such as the New York State Statute here involved. This opinion in part states:

> "There has been some diversity of opinion in other jurisdictions as to whether the Legislature may confer on private persons or organizations the actual power of appointing public officers, as distinguished from merely authorizing them to make nominations."

It would appear that the majority opinion, as to this phase of the case, is rested on contention that there is probability of securing more qualified persons for the public office, through the appointment procedure provided for by the Statute.

In the Court of Appeals of the State of New York, the minority opinion, as to this phase of the case is rested on contention that there is probability of undermining Constitutions of a free people, by appointment to public office through the appointment procedure provided for by the Statute. This opinion in part states,

> "I apprehend no good reason for encouraging such a practice for it is by such means that Constitutions adopted by a free people are gradually undermined and finally over thrown."

The Legislature of the State of New York is required to be as responsive to the Constitution of the United States, as are ordinary citizens. *Baker* v. *Carr*, 82 U.S. 7 L. ed. 2d 663, where it is said,

> "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to pre-

clude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The Legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators."

In view of the thorough discussion in the majority opinion and in the minority opinions of the Court of Appeals of the State of New York, as to this phase of the case, there would seem to be no need for further discussion. Suffice it to say, that the Statute clearly provides for appointment of public officers, by private persons, who do not directly or indirectly derive from the people, and therefore the Statute is void as being in violation of Article 4, § 4 of the Constitution of the United States.

### As to Due Process and Equal Protection of the Laws.

The New York State Statute denies to petitioners due process and the equal protection of the laws, and therefore the Statute is void as being in violation of Amendment XIV, § 1 of the Constitution of the United States.

It is conceded that there never was the slightest semblance of any suggestion that either petitioner was concerned with any misconduct, and that the Statute under which they were appointed to public office, fixed the terms of office, and provided that there could be removal from such office only for misconduct, on notice and hearing.

Yet, the New York State Statute operates to remove each petitioner from his office, without claim of misconduct and without notice or hearing. Certainly, it is a denial of due process, for the Legislature to oust petitioners who were lawfully appointed to their offices, by purporting to abolish the offices, and at the same time naming other persons to such offices. *Matter of Wipfler* v. *Klebes*, 284 N. Y.

248; *Long* v. *City of New York*, 81 N. Y. 425; *People ex rel. Devery* v. *Coler*, 173 N. Y. 103, 113.

It is conceded that the Selection Board did not consider either petitioner as a nominee, for submission to the Mayor. It is settled that there is a violation of the constitutional guarantee of equal protection of the laws, by an unequal and discriminatory administration of a Statute which appears to be fair and legal on its face. *Poindexter* v. *Greenlow*, 114 U. S. 270, 295, 296; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374; *Detroit United Ry.* v. *Michigan*, 242 U. S. 238, 247.

The New York State Statute clearly deprived petitioners of their right to due process and of their right to equal protection of the laws, and therefore the Statute is void as being in violation of Amendment XIV, § 1 of the Constitution of the United States.

## IX.

## Prayer

Petitioners therefore pray, that a writ of certiorari issue out of the Supreme Court of the United States, to either or both of the Supreme Court of the State of New York and the Court of Appeals of the State of New York to review the judgments and order referred to in this petition, and that upon due proceedings had, that such judgments and order be reversed, and an adjudication made that the New York State Statute, being Chapter 971 of the Laws of 1961 is void and of no effect and that petitioners have such other relief as is appropriate.

Respectfully submitted,

VITO F. LANZA
*Attorney for Petitioners*
32 Court Street
Brooklyn 1, New York

## Certificate of Service

I certify that the respondents Robert F. Wagner as Mayor of the City of New York and Louis J. Lefkowitz, Attorney General of the State of New York, have been properly served, in accordance with Rule 33 of the United States Supreme Court, with a copy of the foregoing petition for a writ of certiorari, by depositing a copy thereof in a United States postoffice, correctly addressed to the attorney of record at his postoffice address for each respondent, with first class postage prepaid. I execute this certificate as a member of the Bar of the United States Supreme Court.

New York City, N. Y. this August 13, 1962.

VITO F. LANZA

## APPENDIX I

### Opinion of Mr. Justice Benjamin Brenner of Special Term Dated September 19, 1961

I find no merit in the contentions made by these plaintiffs, who are two of the members of the Board of Education of the City of New York who functioned as such board members prior to the enactment of Chapter 971 of the Laws of 1961 of the State of New York and whose terms are to terminate September 20, 1964 as a result of the enactment of said statute. The plaintiffs rely mainly upon the argument that the legislation is unconstitutional in that it is violative of the home rule amendment to the Constitution of the State of New York and that they will suffer irreparable damage as a result of the appointment and swearing in of the members of the new Board. I shall deal with all of the points raised in the papers before me and on oral argument in a written opinion, but it must suffice for me to state for the record now that the application for the temporary injunction to restrain the Mayor of the City of New York from proceeding with the swearing in ceremonies this afternoon is denied since there is little likelihood of success in the action; indeed as it presently appears to me, there is little merit in the action for declaratory judgment itself. However, I shall reserve decision on the application of the defendants for a dismissal of the complaint.

In passing, I wish to say relative to the oral argument made before me this morning that the legislation is not in the nature of a bill of attainder as it is not directed against any one of these plaintiffs nor has it pronounced them guilty of any alleged crime without trial or conviction nor has it passed sentence of any kind upon them. Indeed, the preamble simply finds that conditions existing in the school system of the City of New York have shaken public

confidence which caused the Legislature grave concern calling for prompt and corrective action. This finding is explicit in the statute and is presumably based upon information supplied to the members of the Legislature by the Commissioner of Education of the State of New York. I am aware of no principle of law which requires the Legislature to conduct hearings or to make an investigation nor is the Legislature prohibited from relying upon State officials in its enactment of emergency legislation. In any event, it is the Board as a whole and not its individual members which has been found to have been remiss and to have caused the shaking of public confidence in the school system, so that any comparison with the enactment of a bill of attainder is altogether inappropriate.

## APPENDIX II

### Opinion of Mr. Justice Benjamin Brenner Dated September 25, 1961

Law Journal of September 27th, 1961.

Lanza v. Wagner—This is a motion for an injunction pendente lite to restrain the Mayor of the City of New York from nominating and appointing new members of the Board of Education of the City School District of the City of New York pursuant to chapter 971 of the Laws of 1961 of the State of New York. The relief is requested pending a determination of a suit for a judgment declaring that said statute is unconstitutional, brought by two members of the board whose terms expire on September 20, 1961, by virtue of its enactment.

The motion was denied several hours prior to the appointment sought to be enjoined, for the reasons set forth in the record and as more fully stated herein. Decision was also reserved on the cross-motion made during the recorded argument to dismiss the complaint for the declaratory judgment (the latter application is one which I have the power to determine on a motion for an injunction pendente lite) (Leonard v. John Hancock Mutual Life Inc. Co., 118 N.Y.S. 2d 170, Aff'd 119 N.Y.S. 2d 918).

Before an injunction pendente lite may issue, the court must be satisfied, first, that the plaintiff's right to the ultimate relief requested is not in doubt (Pechter Baking Co. v. Bober, 240 App. Div. 848, 266 N.Y.S. 814; Russell v. American Gas & Electric Co., 152 App. Div. 136, 136 N.Y.S. 602; Sanka Coffee Corp'n v. Broadway Subway Adv. Co., 221 App. Div. 579, 224 N.Y.S. 514), and second, that the irreparable damage which it is claimed will result from its denial outweighs the damage which may result to the party whose actions are sought to be restrained (Waters

of White Lake, Inc. v. Fricke, 276 App. Div. 807, 93 N.Y.S. 2d 102). And, as to both of these requirements, plaintiffs have the burden of proof (Park Terrace Caterers, Inc. v. McDonough, 9 App. Div. 2d 113, 191 N.Y.S. 2d 1001). The initial inquiry, therefore, is whether there is doubt concerning plaintiffs' suit for a declaratory judgment for if I am satisfied that they are not entitled to that ultimate relief, I must reject their request for temporary judicial intervention.

The cause primarily relied upon in the complaint is that the statute in question is unconstitutional under the home rule provisions of the New York State Constitution. On oral argument, however, plaintiffs argued additionally that the statute was unconstitutional in that it was in the nature of a bill of attainder; that it was violative of the due process clause of the New York State Constitution in that it deprived them of public office, conceived by them as a property right, without notice, confrontation and hearing.

The Legislature enacted the statute at an Extraordinary Session called by the governor to deal with a crisis in the educational affairs of the New York City Board of Education which he, the governor, found to exist on information apparently furnished him by the State Commissioner of Education. The law declares the Legislature to have found that "the conditions existing in the school system of the City of New York have shaken public confidence, caused the Legislature grave concern and call for prompt corrective action. These conditions include:—irregularities in the school construction program—serious hazards in school buildings due to inadequate maintenance and improper repairs—instances of corruption among employees —staggering administrative complexities and needless red tape.

*Appendix II*

The Commissioner of Education has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action." It then proceeds to take the following corrective action: (1) terminates the terms of office of the persons who on the effective date of this act comprise the membership of the Board of Education, and (2) provides a method of choosing a new board of education, which method gives the notice of such persons to the Mayor of the City of New York from a group to be chosen by a special board which is constituted for the purpose. The statute also repeals certain provisions of the Education Law which had already provided the manner in which the Board of Education of the City of New York was to be chosen.

Plaintiffs have likened the emergency legislation to that of a bill of attainder because they were thereby summarily discharged without opportunity to defend their reputations and records and without proof of personal wrongdoing which, they say, is violative of article I, section 10, of the United States Constitution. This appears to me to be an altogether groundless charge. While the legislative findings specifically cite improper and deleterious conditions as prevailing in the school system, no blame for those conditions is directed to plaintiffs, either as individual members of the board or to the board as a unit. Nor is any crime cited against property taken from or punishment meted out to these plaintiffs—all ingredients of what is commonly understood to be a bill of attainder. Indeed, the individual plaintiffs before me may well have served without personal blemish and neither the attorney general nor the corporation counsel has charged them with any personal impropriety or wrongdoing. Any comparison of the law under attack to that of a bill of attainder is therefore altogether inappropriate. Though plaintiffs complain that the legislative findings are not based on hearings conducted

by the Legislature, I am aware of no principle of law which requires it to conduct such hearings or to make its own investigation. Indeed, the Legislature may forego hearings altogether or, as it did here, it may rely upon the report of a state official, in this instance the commissioner of education, when enacting legislation, emergency or otherwise.

Now I find no merit in the contention that the home rule provisions of the New York State Constitution have been violated. While plaintiffs do not identify the articles or sections of the constitution they contend are being violated, it is apparent that they are referring to article 9, sections 8 and 9. These sections give the city of New York the right to abolish certain offices within the City of New York and prevent the Legislature from passing laws relative to them. They have been interpreted as designed to give the people in subdivisions of the state the right to elect county, city, town and village officials (People, &c., v. Albertson, 55 N. Y. 50; People v. Pelham, 215 N. Y. 374). They do not apply to school district officers (Op. Education Dept. 1917, 14 St. Dept. Rep. 431). This is quite logical as the City school districts and boards of education remain creatures of the state Legislature even though power is vested by it in city governments to appoint and remove their members and to approve their budgets, as provided in the Education Law. But precisely because of those very formidable powers, particularly that of control of the purse strings, the boards as agencies of the state government must remain independent of local governments. Indeed, the primary function of the boards being to educate the children in conformity to the provisions of the Education Law, control of that function is rightfully withheld from all state agencies and political subdivisions other than the Department of Education of the State of New York. It is clear, therefore, that the board of education and their members are not the subjects of or affected by the home rule provisions of the constitution.

But even if I were to assume that these public offices did come within the home rule provisions of the state constitution, the Legislature reserves the power to make changes in the home rule law (DiPrima v. Wagner, 14 App. Div. 2d 36, Aff'd 10 N.Y. 2d 728), especially when the action taken merely changes the method of selection of those state officials from that previously set out by it. Additionally, the power of appointment is still left in the hands of the mayor, as is his power to remove for cause under existing charter provisions (chapter 20, para. 523, N.Y. City Charter), which has not been altered. It follows that the Legislature may, as it chose to do here, provide for a new method of appointment though it also exercised its prerogative by discharging the existing board. It may be noted, in passing, that if the Commissioner of Education of the State of New York, as a state official, were to remove board members pursuant to the power also vested in him under Education Law, section 306, such action would appear to amount to some diminution of home rule. Yet the argument has never been advanced that this power is in conflict with the home rule concept.

The further claim of unconstitutionality, advanced by plaintiffs on oral argument, is that they had been deprived of property without due process of law because there was neither a preferment of charges nor a hearing. Of course, if plaintiffs had been removed for cause under existing provisions of law which do require officials to prefer charges and conduct hearings prior to removal, the failure to provide them would entitle plaintiffs to relief. But where the Legislature chose to take the matter of removal into its own hand by abolishing the old board, those provisions could not possibly bind the governing body itself.

Lastly, the contention that the right to public office though it provides for no compensation, constitutes a property right, is a rather tenuous one for which the plaintiffs

have not cited any authority. While it is conceivable that loss of reputation might indirectly cause loss of property, the termination of voluntary public office, where tenure is not specifically protected by constitutional safeguards, is a risk which must be anticipated by those who accept such posts.

The basic grievance of the plaintiffs appears to be that they were not considered as prospective members of the new board but I cannot see how this constitutes any deprivation of their constitutional right since they have established no vested or other right to be members of either the old or new board.

A final word on the question of the claimed irreparable damage consequent upon the denial of this motion. Plaintiffs have wholly failed to satisfy me that any damage which may thus ensue to them personally is greater than the damage which must result to the City of New York and its school children upon preventing the appointment of the new board pursuant to the statute. Obviously, the latter event in the light of the present factual situation might well result in chaos in the entire school system of the city.

In view of the findings herein, I must of necessity hold that the action for a declaratory judgment is itself without merit and the complaint is consequently dismissed. An order having already been entered denying the motion, settle a further order on notice to dismiss the complaint.

# APPENDIX III

## Memorandum Decision of Appellate Division December 21, 1961

THE NEW YORK LAW JOURNAL

12—Thursday, December 21, 1961

By Ughetta, *Acting P.J.*; Christ, Pette and Brennan, *JJ.*

Lanza, ap, *v.* Wagner, res—In an action by two members of the Board of Education of the City of New York: (a) to declare unconstitutional a statute (L. 1961, ch. 971) which provides for the termination of the terms of office of all the then members of the board and for the appointment of their successors; and (b) to enjoin the Mayor of the City of New York from appointing the new members, plaintiffs appeal: (1) from an intermediate order of the Supreme Court, Kings County, dated September 19, 1961, denying their motion for a temporary injunction; (2) from a final order of said court, dated September 29, 1961, again denying said motion and granting defendants' cross-motion, made on oral argument, to dismiss the complaint; and (3) from the judgment, dated October 11, 1961, entered on said orders, dismissing the complaint. Orders and judgment affirmed, without costs. No opinion.

## APPENDIX IV

### Opinion of Court of Appeals

(Decided May 17, 1962)

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PRESENT: DESMOND, CH.J.; DYE, FULD, FROESSEL, VAN VOORHIS, BURKE and FOSTER, JJ.

Appeal, on consitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 4, 1962, unanimously affirming a judgment of the Supreme Court, entered in Kings County upon an order of the court at Special Term (Benjamin Brenner, J.; opinion 30 Misc. 2d 212) dismissing the complaint.

Samuel Shapiro and Vito F. Lanza, in person, for appellants.

Leo A. Larkin, corporation counsel (Sidney P. Nadel, Seymour B. Quel and Joseph M. Callahan, Jr., of counsel), for Robert F. Wagner as Mayor of the City of New York, respondent

Louis J. Lefkowitz, Attorney-General (Irving Galt and Sheldon Raab of counsel) in his statutory capacity under section 71 of the Executive Law.

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FULD, *J.* — Prior to the summer of 1961, the Education Law of this state provided that the Board of Education of the City of New York was to consist of nine members appointed by the mayor (sec. 2553, subdiv. 2). During the early part of August, the mayor asked those then serving on the board to resign, and all except three tendered their resignations. On August 21, the Legislature, convened by the governor, met in an extraordinary session for the pur-

pose of dealing with conditions in the school system of New York City. Finding and declaring that "The conditions existing in (such) school system * * * have shaken public confidence, cause * * * grave concern and call for prompt corrective action" (sec. 1)—in short, finding that "this is a time of crisis for the New York city schools" (sec. 1)—the Legislature passed the statute, now before us, under which the city's board of education was to be reorganized and reconstituted, the method of effecting appointments to the board materially altered (L. 1961, chap. 971).

Pursuant to the legislation, the terms of those then comprising the board of education were to come to an end on September 20, 1961 (sec. 2) and appointments of new members of the board, as well as of their successors, were to be made by the mayor from a list of nominees to be submitted to him by "a selection board" consisting of the heads of three universities located in New York City and the presidents of eight other organizations representing educational, civic, business, labor and professional groups interested in city affairs including education (secs. 3, 5).[1] In making its nominations, the selection board was directed to receive and consider "recommendations from representative associations (and) * * * groups active or interested in the field of education" and to select nominees who in its judgment are "persons of outstanding experience, competence and qualification for service on the board of educa-

[1] The selection board consists of "the president of Columbia University; the chancellor of the City University of New York; the president of New York University; the president of the Association of the Bar of the City of New York; the president of the New York City Central Trades and Labor Council; the president of Commerce and Industry Association of New York, Inc.; the president of the Public Education Association; the president of the United Parents Associations of New York City, Inc.; the president of the League of Women Voters of the City of New York; the president of Citizens Union; and the president of the Citizens Budget Commission, Inc."

tion" (sec. 3). For the purposes of the initial appointment of nine new board members, the selection panel was required to submit a list of at least eighteen names by September 15, 1961 (sec. 3). If the mayor should fail to make the appointments by September 20, the state commissioner of education was to make them from among the nominees submitted to the mayor (sec. 3). If the selection board submitted less than eighteen names to him, the mayor was "to fill from the names submitted that number of vacancies equal to one-half the number of names submitted disregarding resulting fractions and the mayor (was authorized to) fill any remaining vacancies * * * without regard to the provisions of this section" (sec. 3).[2]

Following enactment of the statute, the selection panel met, nominated twenty-six persons, eight more than the specified minimum, and submitted a list of such nominees to the mayor. Several days later, the mayor made his appointments to the board from that list. The plaintiffs, former members of the board who had not resigned and whose terms of office still had some time to run, brought this action for a judgment (1) declaring the new statute unconstitutional and (2) enjoining the mayor from making appointments to the board—to cull from their complaint—"in (their) place and stead."[3] The court at Special Term dismissed the complaint, the Appellate Division affirmed unanimously and the appeal is here as of right on constitutional grounds.

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[2] In addition, the statute contains provisions designed to strengthen the power of the board of education and to assure closer supervision of the educational affairs of New York City's school system by the Regents and the commissioner of education during an "emergency period," which was to continue until July 1, 1962 (sec. 7).

[3] The Attorney-General was joined as a party defendant because of the attack on the constitutionality of a state statute (Executive Law, sec. 71).

*Appendix IV*

The plaintiffs' basic contention is that, in so far as chapter 971 of the Laws of 1961 terminates their terms of office and provides for a new method of appointing board members, it violates the home rule provisions of the State Constitution (Article IX, sec. 9) and, in so far as it vests the power of nomination in private persons and organizations, it not only interferes with home rule but also constitutes some sort of impermissible delegation of legislative authority. They further urge that the statute is a bill of attainder, in violation of section 10 of Article I of the United States Constitution.

We may quickly dispose of the attack upon the statute on the score of its having shortened the plaintiffs' terms of office. The office held by each of the plaintiffs was concededly created by the Legislature, not by the Constitution, and there is no constitutional inhibition against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than at its incumbent (see *Conner* v. *Mayor of City of N. Y.*, 5, N. Y. 285, 295-296; *Long v. Mayor of City of N. Y.*, 81, N. Y. 425; *Dodge* v. *Board of Education*, 302 U. S. 74, 78-79; *Phelps* v. *Board of Education*, 300 U. S. 319, 323). Public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in the office (*Long* v. *Mayor of City of N. Y.*, 81, N. Y. 425, 427-428, *supra*). Absent any express constitutional limitation, the Legislature has full and unquestionable power to abolish an office of its creation or to modify its term, or other incidents attending it, in the public interest, even though the effect may be to curtail an incumbent's unexpired term (see *Conner* v. *Mayor of City of N. Y.*, 5, N. Y. 285, 295-296, *supra; Long* v. *Mayor of City of N. Y.*, 81, N. Y. 425, 427-428, *supra; Dodge* v. *Board of Education*, 302 U. S. 74, 78-79, *supra*).

We may equally briefly in dealing with the plaintiffs' attack on the statute as a bill of attainder. Such a bill has

been defined as a legislative act which applies either to named or easily identifiable individuals in such a way as to inflict punishment or impose penalties upon them without a judicial trial (see *Cummings* v. *State of Missouri*, 4 Wall., 71 U. S., 277, 323; *United States* v. *Lovett*, 328 U. S. 303, 315; *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722; *Communist Party* v. *Control Board*, 367 U. S. 1, 82 *et seq.*). Stated even more succinctly, "Punishment is a prerequisite" (*Garner* v. *Los Angeles Board*, 341 U. S. 716, 722, *supra*). There is not the slightest warrant in the present case for the charge that either the purpose or the effect of the statute was to punish or impeach the plaintiffs or any other incumbent member of the former board or to render them ineligible for consideration as potential appointees to the new board. It is clear that general legislation such as this, designed solely to provide a more effective and efficient body and aimed at the office of board members rather than at the incumbent office holders, has none of the objectionable attributes of a bill of attainder (see *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722, *supra*).

This brings us to the challenge directed at the new appointive procedure prescribed by the statute. As we have already stated, the plaintiffs' principal reliance is on the home rule provisions of our State Constitution, contained in section 9 of Article IX. As far as pertinent, section 9 reads as follows:

> "All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution and all officers whose offices

may hereafter be created by law shall be elected by the people or appointed, as the Legislature may direct."

The purpose of these provisions is to preserve the principle of home rule for cities, towns and villages "by continuing the right of these divisions to select their local officers, with the general functions which have always belonged to the office" (People *ex rel. Metropolitan St. R'y Co.* v. *State Board of Tax Comm'rs*, 174 N. Y. 417, 434; see also *People ex rel. Wood* v. *Draper*, 15 N. Y. 532, 539). With the exception of essentially new offices, created after the adoption of the constitutional provisions, the Legislature is thus prohibited from providing for the selection of such local officers other than through local elections or through appointment by local authorities (see *Matter of Brown-Lipe Gear Co.* v. *Ferris*, 275 N. Y. 418; *People ex rel. Town of Pelham* v. *Village of Pelham*, 215 N. Y. 374; *People* v. *Raymond*, 37 N. Y. 428; see also *Matter of McAneny* v. *Board of Estimate*, 232 N. Y. 377, 390-391; *Matter of Morgan* v. *Furey*, 186 N. Y. 202, 206-207). Those restrictions do not, however, apply to non-local or newly created offices (see *People ex rel. Wood* v. *Draper*, 15 N. Y. 532, 539, *supra*; *Sturgis* v. *Spofford*, 45 N. Y. 446, 450; *Matter of Morgan* v. *Furey*, 186 N. Y. 202, 206-207, *supra*).

It is perfectly clear, as all the members of the court agree, that the plaintiffs' reliance on section 9 is misplaced, since members of New York City's Board of Education are not "city officers" within the meaning of that section. On the contrary, it has long been settled that the administration of public education is a State function to be kept separate and apart from all other local or municipal functions (N. Y. Const., Art. XI, sec. 1; Art. IX, sec. 13, subdiv. B). Although members of a Board of Education in a city perform tasks generally regarded as connected with local

government, they are officers of an independent corporation separate and distinct from the city, created by the State for the purpose of carrying out a purely State function and are not city officers within the compass of the Constitution's home rule provisions (see *Gunnison* v. *Board of Education*, 176 N. Y. 11, 23; *Matter of Emerson* v. *Bock*, 230 N. Y. 380, 385; *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125, 135; *Matter of Divisich* v. *Marshall*, 281 N. Y. 170, 173; *Nelson* v. *Board of Higher Education of City of N. Y.*, 263 App. Div. 144, 149, aff'd 288 N. Y. 649; *People ex rel. Elkind* v. *Rosenblum*, 184 Misc. 916, aff'd 269 App. Div. 859, aff'd 295 N. Y. 929; *Matter of Board of Education of Bethlehem Union Free School Dist.* v. *Wilson*, 303 N. Y. 107, 113). "If there be one public policy well-established in this State," this court declared in *Matter of Divisich* v. *Marshall* (281 N. Y. 170, 173, *supra*), "it is that public education shall be beyond control by municipalities and politics. The Board of Education of the City of New York is not a department of the city government, it is an independent corporate body."

The circumstance that the city exercises fiscal control over the Board of Education or that the Legislature has seen fit to vest the power of appointment and of removal of its members in the mayor or that school personnel in certain instances have been made subject to the same controls and limitations as city employees cannot affect the status of the board as an agency of state government. The statutory requirements that the Board of Education submit expense budget estimates to the Board of Estimate (Education Law, sec. 2576) and an annual report to the mayor (New York City Charter, sec. 522) are merely corollaries of the obligation imposed on New York City, as it is on other municipalities, to contribute to the support of education furnished within its territorial limits (see *Matter of Divisich* v. *Marshall*, 281 N. Y. 170, 174, *supra*). And, in

exercising his appointive and removal powers, the mayor is acting by legislative direction as a state officer in support of the state system of education (Cf. *Maxmillian v. Mayor of City of N. Y.*, 62 N. Y. 160, 165-166). It is because of his intimate knowledge of affairs in the city, because it regards the mayor as qualified to act in these areas, that the Legislature has invested him with such powers. The Commissioner of Education, it should be observed, has similar powers of removal (Education Law, sec. 306). Nor does the fact that school personnel have been made subject to some of the prohibitions imposed on city employees (see *Matter of Daniman v. Board of Education of City of N. Y.*, 306 N. Y. 532, 539) signify that school personnel have thereby been made muncipal officers within the meaning of the Constitution. All it means is that the Legislature has determined that school personnel who are operating within the territorial limits of the city shall in certain respects be subject to the same restrictions as are placed upon city employees. As Justice Brenner aptly observed at Special Term, it is in large measure because of the "very formidable powers (vested in the city), particularly that of control of the purse strings, (that) the boards as agencies of the state government must remain independent of local governments."

Since, then, education is a state, not a local, function and members of New York City's Board of Education are state, not local, officers, the home rule restrictions of section 9 are inapplicable and, under the explicit language of that section, such officers may be "elected by the people or *appointed, as the legislature may direct.*" (Emphasis supplied.)

Despite this apparently unrestricted grant of power to the Legislature to direct the mode of selection of non-local officers, whose election or appointment is not provided for by the Constitution, it is insisted that the method of ap-

pointment provided for by chapter 971 must be condemned as an unlawful delegation of legislative authority in violation of section 1 of Article III of the State Constitution. As we understand the argument, it is that the Legislature may not confer on private individuals or organizations a voice of any kind in the appointment of public officers, and that such a delegation constitutes an unconstitutional relinquishment of legislative authority.

We shall shortly consider the ample authority, both in this state and elsewhere, supporting the validity of legislation providing for an appointive procedure such as that prescribed by the present statute. But, before doing so, it is worth noting that this very technique—of designating a representative panel of responsible and knowledgeable persons to assist the appointing power by submitting a list of eminently qualified nominees from among whom the appointments are to be made—is by no means a novel one in New York. Since before the turn of the century, a similar procedure has been followed in the appointment of state boards of examiners and committees on grievances. The Education Law contains a number of sections providing for the appointment of members of such bodies by the State Board of Regents from among nominees designated by private professional societies (see e.g., Education Law, sec. 6607, derived from Public Health Law of 1893, sec. 161, as added by L. 1896, chap. 297, sec. 2 [State Board of Dental Examiners]; Education Law, sec. 6703, derived from Public Health Law of 1893, sec. 172, as added by L. 1895, chap. 860; sec. 1 [State Board of Veterinary Medical Examiners]; Education Law, sec. 6802, derived from Public Health Law of 1893, sec. 180 [State Board of Pharmacy]; Education Law, sec. 6903, derived from Public Health Law of 1893, sec. 207, as added by L. 1903, chap. 293, sec. 1 [State Board of Examiners of Nurses]; Education Law, sec. 7004 [State Board of Podiatry Examiners]; Education Law, sec. 6515

[Committee on Medical Grievances]; Education Law, sec. 6515-a [Committee on Physiotherapy Grievances]; Education Law, sec. 6904 [Advisory Council of Nurses]).

In our judgment, the Legislature's power to provide such a method of appointment is not open to doubt. In so many words, section 9 of Article IX of our constitution declares that all officers other than local officials whose election or appointment is not provided for by the Constitution (and all officers whose offices "may hereafter be created" by law) "shall be elected by the people or appointed, as the Legislature may direct." This is plain, forthright language and, as this court long ago held when called upon to consider the constitutionality of legislation which went much further than that now under review, it means precisely what it says (see *Sturgis* v. *Spofford*, 45 N. Y. 446, *supra*; see also *Matter of Kane* v. *Gaynor*, 144 App. Div. 196, 197, aff'd 202 N. Y. 615; *State Board of Pharmacy* v. *Bellinger*, 138 App. Div. 12, 14-15; *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 279). The statute upheld in the Sturgis case, instead of providing for a selection or nominating board, actually vested the very power of appointment in specified private organizations. More particularly, it established a board of five commissioners of pilots for the Port of New York and provided for the "election" of "three * * * by the members of the chamber of commerce, and the other two by the presidents and vice presidents of the marine insurance companies of the City of New York represented" in the city's board of underwriters.

In a carefully considered opinion by Chief Justice Church, the court sustained the validity of the statute and the method of appointment prescribed. Judge Church rejected the contention that "the power of appointment can only be conferred (by the Legislature) upon somebody or officer representing or responsible to the people." Discussing the home rule provisions of the Constitution of

1846 (Art. X, sec. 2), which were practically identical with those contained in our present Constitution (Art. IX, sec. 9), he pointed out that the limitations contained therein on the Legislature's power vis-a-vis the election or appointment of local officers were "carefully omitted" in the very next clause dealing with the election or appointment of "all other officers whose election or appointment is not provided for by (the) Constitution, and all officers whose offices may hereafter be created by law." With respect to the latter classes of officials (which the court decided included commissioners of pilots as offices "hereafter created"), he wrote (45 N. Y., at p. 450):

> "The omission of any direction as to the appointment of such officers is significant of the intention of the framers and the people to leave the unrestricted power in the Legislature. The inconsistency with the mode prescribed for appointing or electing the enumerated officers is one authorized by the express provision of the Constitution itself."

In other words, the Constitution itself grants to the Legislature the power to prescribe the method by which officers other than those provided for by the Constitution shall be selected or chosen.

The great weight of authority throughout the country supports this conclusion (see e. g., *Matter of Opinion of the Justices*, 252 Ala. 559; *Matter of Bulger*, 45 Cal. 553; *Ex Parte Gerino*, 143 Cal. 412; *Overshiner* v. *State*, 156 Ind. 187; *Marks* v. *Frantz*, 179 Kan. 638; *Elrod* v. *Willis*, 305 Ky. 225; *McCurdy* v. *Jessop*, 126 Md. 318; *Bradley* v. *Board of Zoning Adjustment*, 255 Mass. 160; *Driscoll* v. *Sakin*, 121 N. J. L. 225, aff'd 122 N. J. L. 414; *State ex rel. Hunker* v. *Hummel*, 143 Ohio St. 604; *Floyd* v *Thornton*, 220 S. C. 414; but see, *contra*, *Lasher* v. *The People*, 183 Ill. 226; *State ex inf. Hadley* v. *Washburn*, 167 Mo. 680). In some of these

cases, the statute, similar to that in Sturgis, delegated the ultimate power of appointment to a private society or association,[4] while, in others, the enactment, resembling the one now before us, provided for a selection panel of private persons or organizations to submit a list of nominees to the appointing power for ultimate appointment.[5]

In *Ex Parte Gerino* (143 Cal. 412, *supra*), for instance, the statute provided that private medical societies were to appoint the members of the State's Board of Medical Examiners. In answering the contention that the statute vested the power of appointment to public office in private organizations, the California Supreme Court called attention to a provision of its Constitution—almost identical with section 9 of Article IX of ours (p. 414)—and then went on to hold (pp. 414-415):

> "This gives the Legislature power to declare the manner in which officers other than those provided by the constitution shall be chosen. Such officers may be appointed by the Legislature itself, or the duty of appointment may be delegated and imposed upon some other person or body. (*People* v. *Provines*, 34 Cal. 541; In re Bulger, 45 Cal. 559). There is no limitation to any particular person or class of persons upon whom alone the Legislature may impose this obligation."

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[4] See *Matter of Opinion of the Justices*, 252 Ala. 559, *supra*; *Matter of Bulger*, 45 Cal. 553, *supra*; *Ex parte Gerino*, 143 Cal. 412, *supra*; *Overshiner* v. *State*, 156 Ind. 187, *supra*; *McCurdy* v. *Jessop*, 126 Md. 318, *supra*; *Driscoll* v. *Sakin*, 121 N. J. L. 225, aff'd 122 N. J. L. 414, *supra*; *State ex rel. Humker* v. *Hummel*, 143 Ohio St. 604, *supra*.

[5] See *Marks* v. *Frantz*, 179 Kan. 638, *supra*; *Elrod* v. *Willis*, 305 Ky. 225, *supra*; *Bradley* v. *Board of Zoning Adjustment*, 255 Mass. 160, *supra*; *Floyd* v. *Thornton*, 220 S. C. 414, *supra*; see, also, *State ex rel. James* v. *Schorr*, 45 Del. 18, 27-28, 32-33.

*Appendix IV*

In *Bradley v. Board of Zoning Adjustment* (255 Mass. 160, *supra*), the statute, in format similar to the one before us, created a zoning adjustment board (for Boston) composed of persons to be appointed by the mayor from candidates nominated by the chamber of commerce and other private organizations, including the Associated Industries of Massachusetts, the Boston Central Labor Union, the Boston Real Estate Exchange and the Boston Society of Architects. The Massachusetts high court upheld the act against the challenge that "the freedom of appointment naturally appurtenant to the power (in the mayor) to name a public officer (was) curtailed beyond constitutional bounds" (pp. 164-165). After observing that "A statute designed to secure men of eminent sagacity for the performance of these duties is entitled to every presumption in its favor" (p. 166), the court declared (pp. 166-167):

> "The executive officers and members of these several societies may be thought to know the persons possessing the finest expert knowledge and widest practical experience touching the various departments of activity indicated by their names. The nominations are not required to be made from the membership of the several societies. A wide field is open to the nominating societies to find those best adapted by character, learning, experience and common sense to perform the specified duties. The qualifications of persons appointed from nominees thus presented to the appointing officer doubtless were supposed by the Legislature to be likely to be superior to an exceptional degree. The scheme of the statute is to provide by statutory sanction expert advice of unusual quality for the aid of the appointing power. Its design is to secure the administrative and executive ability of men of experience and vision in municipal planning, to meet the exigencies of the present and the pros-

pective needs of the future. Every presumption must be indulged * * * in favor of the view that the duty of making nominations imposed by the statute on the several societies will be performed with a genuinely zealous purpose to present to the consideration of the appointing officer the names of the best men obtainable for the service."

There has been some diversity of opinion in other jurisdictions as to whether the Legislature may confer on private persons or organizations the actual power of appointing public officers, as distinguished from merely authorizing them to make nominations. While the decisions in most of the cases would—as this court held in Sturgis (45 N. Y. 446, *supra*)—permit the Legislature to adopt either of these methods of appointment (see cases, *supra*, p. 330), the courts of a few states have expressed the view that, while the Legislature may grant a voice in the appointive process to private persons or organizations through the submission of lists of nominees, the ultimate power of appointment may not be granted to them (see State *ex rel. James* v. *Schorr*, 45 Del. 18, 27-28, 32-33; opinion of the justices, 337 Mass. 777, 784). No purpose, however, is to be served by treating these variant views at any length, for decision in the present case does not require us to decide whether the Legislature could have validly conferred on the selection panel the power of ultimate appointment to membership of the new board of education. Under the statute before us, it is the mayor (or, in certain contingencies, the commissioner of education) who has been given the responsibility of making the actual appointments to the board. The selection panel merely serves the purpose of providing "by statutory sanction expert advice of unusual quality for the aid of the appointing power" (*Bradley* v. *Board of Zoning Adjustment*, 255 Mass. 160, , *supra*).

*Appendix IV*

The cases relied upon to support the plaintiffs' position are completely beside the point. We are not here confronted —as we were in *Matter of Fink* v. *Cole* (302 N. Y. 216)—with a statute purporting to delegate an essentially legislative power, the issuance of licenses, to a private club or association or—as we were in *Fox* v. *Mohawk & Hudson River Humane Society* (165 N. Y. 517, 523)—with an act violating the constitutional prohibition against the appropriation of public moneys "in aid of any association, corporation or private undertaking" (N. Y. Const. of 1894, Art. VIII, sec. 9, now Art. VII, sec. 8).

Concededly, there is here no appropriation of public funds to any association or private undertaking and, it is just as clear, there is no delegation of legislative authority (N. Y. Const., Art. III, sec. 1). It is sufficient to note that the exercise of the power of appointment to public office is not a function of such essentially legislative character as to fall afoul of the constitutional proscription (see *Sturgis* v. *Spofford*, 45 N. Y. 446, 450, *supra*; *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 279, *supra*; *Reed* v. *Dunbar*, 41 Ore. 509, 514; *Floyd* v. *Thornton*, 20 S. C. 414, 420-421, *supra*; see also 42 Am. Jur., Public Officers, sec. 95; Ann. 79 L. Ed. 474, 573). In the Reed case, for instance, where a statute delegated to another the power to appoint a public official, the court wrote: "It is undoubtedly true that the Legislature cannot delegate powers conferred upon it by the constitution, but the appointment to an office is not one of such powers. The appointment to public office may, under certain circumstances, be made by the Legislature, but it is not a duty imposed upon it by the constitution. The rule invoked refers to the lawmaking power" (41 Ore., at p. 514).

In point of fact, it is an exceedingly narrow and artificial view to emphasize, as the plaintiffs have, the "private"

character of the selection board. It was set up, not to grant any special privileges to the organizations which they head (cf. N. Y. Const., Art. III, sec. 17) but rather to establish a new public or quasi-public body invested with specific duties and responsibilities, in the field of education, for the interest and benefit of the public at large (cf. Matter of Opinion of the Justices, 252 Ala. 559, *supra*; *Ex Parte Girino*, 143 Cal. 412, 415-416, *supra*; *Bradley* v. *Board of Zoning Adjustment*, 255 Mass. 160, *supra*). In short, though, whether we regard the selection board as "private" or "public," we perceive no constitutional bar to the legislative designation of a nominating panel, made up of people representing a knowledgeable cross-section of city interests, either active or vitally interested in the educational life of the city, who could reasonably be expected to present to the mayor, on an objective and non-partisan basis, the names of individuals exceptionally qualified for service on the board of education.

Accordingly, we conclude that the courts below correctly sustained the validity of the entire statute before us. It was error, however, to dismiss the complaint in this action for a declaratory judgment merely because the plaintiffs were not entitled to the declaration sought by them (see, e.g., *Cahill* v. *Regan*, 5 N. Y. 2d 292, 298; *Rockland Light & Power Co.* v. *City of N. Y.*, 289 N. Y. 45, 51; *Civil Service Forum* v. *N. Y. City Transit Authority*, 4 App. Div. 117, 129, aff'd 4 N. Y. 2d 866).

The judgment appealed from should be modified, without costs, to the extent of directing judgment in favor of the defendants (1) declaring that chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for the defendant Mayor of the City of New York to appoint new members to the board of education in accordance with the provisions of the statute.

DYE, *J.* (dissenting). In this action for judgment declaring chapter 971 of the Laws of 1961 (extraordinary session of August 21, 1961) unconstitutional and permanently enjoining the defendant Mayor of the City of New York from proceeding to reorganize the New York City Board of Education under the challenged legislation and replacing plaintiffs with new appointees, the plaintiffs, two former members of the board, appeal on constitutional grounds from a judgment, entered upon an order of the Appellate Division, Second Department, unanimously affirming, without opinion, a judgment of the Supreme Court, Kings County (BRENNER, *J.*) which dismissed the complaint for insufficiency and also from an incident order which denied plaintiffs' motion for a temporary injunction restraining the mayor from acting in the premises and granted defendants' cross-motion to dismiss the complaint for insufficiency (The joinder of the Attorney-General apparently is for the reason that the constitutionality of a statute is challenged [Executive Law, sec. 71]).

During the hotly contested New York City mayoralty campaign in the Summer of 1961, certain actions in the school construction and maintenance program were disclosed, leading to sensational charges of corruption and malfeasance. Early in August, Mayor Wagner requested the resignation of all nine members of the New York City Board of Education, all of whom were then serving unexpired terms with varying dates of termination (Education Law, sec. 2553, former subdiv. 2). Six of these members submitted their resignations but three, including plaintiffs Lanza and Rank whose terms were to expire in May of 1962 and 1964, respectively, refused to resign. Thereafter the Legislature, at an extraordinary session held August 21, 1961, passed, on a message of necessity, the challenged legislation (L. 1961, chap. 971). That statute (amending Education Law, secs. 2553, 2554), after reciting that con-

ditions existing in the school system in New York City had shaken public confidence, caused the Legislature grave concern and called for prompt corrective action, proceeded to list four categories of irregularity, concluding that "this is a time of crisis for the New York city schools * * * the terms of office of the persons then comprising the membership of the board of education of the city school district of the City of New York shall terminate" (L. 1961, chap. 971, sec. 2).

The statute then made provision for a new and novel method of appointment of school board members. The mayor's power of appointment was continued, but sharply curtailed as to whom he should appoint and forfeiture of the power of appointment if he failed to act within a specified time. The eligible list from which the mayor was to make appointments was to be furnished by a selection board consisting of eleven members, who were to convene with the chancellor of the board of regents, from the heads of certain named private business, educational, civic and philanthropic organizations, to wit:

> The president of Columbia University;
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> The chancellor of the City University of New York;
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> The president of New York University;
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> The president of the Association of the Bar of the City of New York;
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> The president of the New York City Central Trades and Labor Council;
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> The president of Commerce and Industry Association of New York, Inc.;
>
> The president of the Public Education Association;
>
> The president of the United Parents Associations of New York City, Inc.;

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The president of the League of Women Voters of the City of New York;

The president of Citizens Union; and

The president of the Citizens Budget Commission, Inc.

The members of the selection board thus designated but not named, no later than September 15, 1961, were to submit a list of eighteen nominees to the mayor for service on the board of education. No later than September 20, 1961, the mayor was to appoint, from such list of eighteen nominees only, nine persons to be members of the board of education. If he failed to do so within the time limit, then the appointments were to be made by the state commissioner of education. The statute also provides that the terms of the incumbents should expire and those of the new members begin on September 20 for staggered terms of eight months to seven years. Such a list of nominees was promulgated, none of whom were present or former members of the board of education. The mayor made his selection within the allotted time and the nine so selected were duly sworn in as members of the board of education on September 19, 1961, at about 3:30 P.M. This time is mentioned because this action was commenced at about 5 P.M., September 18, and was returnable at Special Term on the morning of the 19th. Counsel waived all questions of practice and procedure in order to facilitate the presentment.

Appellants' first contention may be disposed of summarily. There is no invasion of home rule. Matters dealing with education and with boards of education are not within the Home Rule Amendment (Art. IX, sec. 13, Subdiv. B) of the New York State Constitution (*People ex rel. Elkind* v. *Rosenblum*, 295 N. Y. 929, aff'g 269 App. Div. 859, which aff'd 184 Misc. 916).

Recognizing, then, that the power to select members of the New York City Board of Education rests with the Legislature, we come now to appellants' second contention that there has been an unconstitutional delegation of that power to private individuals.

The statute under attack provides, in pertinent part: "At least five days before the effective date of section two of this act, the selection board shall submit a list to the mayor of at least eighteen names of nominees who, *in the judgment of the selection board*, are persons of outstanding experience, competence and qualification for service on the board of education. On the effective date of section two of this act, *the mayor shall appoint nine persons from among the nominees* to be members of the board of education of the city school district of the City of New York." (Emphasis supplied.)

Thus we find that the eleven private individuals who comprise the so-called "selection board" may, in their untrammeled discretion, decide who shall, and who shall not, be considered by the local governmental authorities for appointment to the board of education. Under this arrangement the mayor, instead of being able to choose for appointment to the school board any qualified citizen from among the more than eight million inhabitants comprising the school district, including these plaintiffs, is limited to the eighteen eligibles nominated by the selection board. The board, under the circumstances, is thus not merely a civic advisory committee, but a quasi-executive committee with mandatory power to limit the appointive prerogative of a duly elected public official. However well intended the statutory scheme may be, its practical effect is to delegate a sensitive legislative function to a number of private persons whose identity may not be known for certain until the moment they convene for the purpose of

making a selection of eligibles and, even then, their status is a nebulous one, since they are not sworn as public officers nor are they removable as such. The tendency to run government by committee is becoming a favorite device to circumvent the democratic process which our constitution reposes in the Legislature. Such power may not be delegated to others. The promptings of expediency to deal with momentary political problems, however well directed, furnish a poor excuse for tampering with fundamental principles of government and "can never serve in lieu of constitutional power" (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291).

Not long ago this court unanimously struck down a statute which purported to delegate to a private corporation, the Jockey Club, the "power, *at* [*its*] *discretion*, to grant licenses to Owners, Trainers, and Jockeys" (emphasis supplied). There we said: "In our view the delegation by the Legislature of its licensing power to The Jockey Club, a private corporation, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of section 1 of article III of the Constitution of this State which provides: 'The legislative power of this State shall be vested in the Senate and Assembly.' [citing cases]" (*Matter of Fink* v. *Cole*, 302 N. Y. 216, 224-225).

Similarly, in *Fox* v. *Mohawk & Hudson River Humane Society* (165 N. Y. 517), cited with approval in *Matter of Fink* v. *Cole* (*supra*), it was said: "I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of the citizens" (id. p. 524).

Even if we were to adopt the argument of the Attorney-General that the selection board is itself a new governmental body, there is yet another objection to the statute. The

members of the panel are themselves not individually selected by the Legislature or by an authorized state officer, such, for instance, as the governor of the state, but their selection is left to the happenstance of who may be filling the chief executive office of the named private organization, the membership of which, so far as we know, may be composed of persons of certain types, classes and occupation, or perhaps even aliens; whom they may choose as their chief executive officer from time to time cannot be foretold—he might not even be a citizen—and whose identity cannot be known for certain until the very moment they meet to promulgate a list of names from whom the mayor must select a board of education. Nor may anyone be sure how such persons are selected for the named executive office of the designated private voluntary organizations, since they have no connection with government, owe it no duty and are subject to no governmental supervision or control except as is common to any corporate and membership group. Even though we assume that the organizations named are composed of reputable law-abiding people who are motivated with the best of intentions, their chief executives, when meeting as a selection board, cannot be deemed a public body, absent an oath requirement or accountability for the action taken. The method of selection provided by the statute under review runs squarely afoul of the principle enunciated by this court in the *Fox* case: "the corporations are private in the sense that they proceed from the voluntary action of the individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens), *that the agents or officers of the corporation are appointed such by the corporators and that if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public offices on a few of the citizens, and possibly persons not citizens, while under the Constitution, all*

*public officers must be elected or appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the people*" (p. 525; emphasis supplied). There is little or no relation between the unofficial, unnamed, unidentified persons designated to make up the selection board and the administration of the school system of the City of New York. The selection board thus authorized is not at all like the various state examining boards for professional licenses where, to be qualified, a distinct and special expertise is essential for the proper conduct of the examination. Why these particular voluntary organizations were selected, rather than some of the hundreds of others equally reputable with which the City and State of New York abound, does not appear and may be of no great importance, but it is certain that the organizations so selected cannot and do not represent the People of the City of New York. The delegation of legislative power thus attempted is more than a mere transfer of authority. It is a delegation upon a delegation done for the purpose of curbing and limiting the appointive power of the Mayor of the City of New York. What is to prevent the use of a similar pattern in respect to every other city and state public officer possessing the power of appointment is difficult to perceive. I apprehend no good reason for encouraging such a practice for it is by such means that constitutions adopted by a free people are gradually undermined and finally overthrown.

I find no merit to appellants' contention that the statute is actually a bill of attainder. Its purpose was not to punish appellants. Nor were these unsalaried officials deprived of any property right, as was the case in *United States* v. *Lovett* (328 U. S. 303, 315), relied on by appellants. The statute there involved provided that certain named individuals, suspected of subversive activities, were not to be paid their salaries. The Lovett case has since been sharply

limited by the United States Supreme Court (see, *e.g.*, *Garner* v. *Los Angeles Bd.*, 341 U. S. 716).

Nor do I find any basis for disturbing provisions of the statute dealing with subjects other than the method of appointment. The unconstitutional provisions may properly be severed and the remainder of the statute sustained (see, *e.g.*, *People* v. *Mancuso*, 255 N. Y. 463; *Schieffelin* v. *Goldsmith*, 253 N. Y. 243; see, generally, 2 Sutherland, Statutory Construction [3d ed.], secs. 2401-2419).

Since this is an action for a declaratory judgment, the complaint should, in any event, not have been dismissed (*Rockland Light & Power Co.* v. *City of N. Y.*, 289 N. Y. 45).

The judgment appealed from should be modified by reinstating the complaint and awarding plaintiffs a judgment declaring that chapter 971 of the Laws of 1961 is invalid to the extent stated herein.

Froessel, *J.* (dissenting). I vote for modification, but upon the following grounds: I agree that there is no invasion of home rule (N. Y. Const., Art. IX, sec. 9), and that the statute before us is not a bill of attainder (U. S. Const., Art. I, sec. 10).

I also agree with Judge Dye that the statute before us is constitutional except in so far as it delegates power to to unnamed private individuals. By that portion of the statute, the presidents of a voters' league, a labor council, an industry association, a united parents' association, and two civic associations (constituting a majority of the so-called selection board) would have the right to dictate to the mayor a list of names from which he must choose members of the board of education. These unnamed presidents are selected by their own private organizations, changed from time to time, are not required to take an oath or to be citizens, as a member of the board of education must be

(Education Law, sec. 2553, subdiv. 1), and their organizations, however worthy they may be in their own fields of endeavor, do not have any particular relationship to education as such, and do not have any connection with any branch of our government. This amounts to an unconstitutional relinquishment of legislative power in violation of section 1 of Article III of our state constitution (*Matter of Fink* v. *Cole*, 302 N.Y. 216; *Fox* v. *Mohawk & Hudson River Humane Soc'y*, 165 N. Y. 517). I do not deem as controlling here the case of *Sturgis* v. *Spofford* (45 N. Y. 446) decided over ninety years ago, and relating to the right of commissioners of pilots to recover certain penalties.

In my opinion, the illegal portion is severable. The test of severability when part of a statute is declared to be unconstitutional is "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excinded, or rejected altogether" (*People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 60). In my judgment, the Legislature here would have wished that the statute be enforced with the illegal part removed. In the first place, the new law, as well as former subdivision 2 of section 2553 of the Education Law, grants to the mayor the *ultimate* power to appoint the members of the board of education. As before (sec. 2553, subdiv. 2) *recommendations* from "representative associations; civic, educational, business, labor and professional groups active or interested in the field of education" are to be considered (L. 1961, chap. 971, sec. 3). Moreover, the present statute gives the Mayor the *unqualified right* to make appointments in two instances: First, had the selection board submitted less than eighteen candidates, the mayor would have had to choose half of the nominees submitted but could have filled remaining vacancies himself; second, when a member's term of office expires, or should a vacancy occur and the selection board fail to submit nomi-

nations to the mayor within fifteen days after the mayor requested the board to convene, the mayor may fill the vacancy himself (chap 971, secs. 3, 5).

Notwithstanding the partial invalidity of the statute, the present membership of the board may be sustained. The mayor is the person directly aggrieved. He has made his selections and is content to leave the membership as presently constituted. Indeed, in his position as respondent on his appeal, he vigorously argues for the retention of the present board. Under these circumstances, it may not be said that the present board is improperly constituted and must be replaced, but the mayor continues to have the right to choose any person who he deems qualified for membership on the board.

The complaint should, therefore, be reinstated; that portion of the statute which mandates the mayor to choose from a list furnished by the selection board should be declared unconstitutional as an invalid delegation of legislative power; in all other respects the statute should be declared constitutional, and the appointments by the mayor should be declared valid. The judgment should be modified accordingly, and without costs.

DESMOND, *Ch. J.*, and BURKE and FOSTER, *JJ.*, concur with FULD, *J.*; DYE, *J.*, dissents in part in a separate opinion in which VAN VOORHIS, *J.*, concurs; FROESSEL, *J.*, dissents in part in a separate opinion.

Judgment modified without costs in accordance with the opinion herein.

# APPENDIX V

## EXTRAORDINARY SESSION

**LAWS OF NEW YORK.—By Authority**

## CHAPTER 971

AN ACT to amend the education law, in relation to reconstituting the board of education for the city school district of the city of New York, providing for the emergency supervision of such district, and making appropriations in relation thereto

Became a law August 21, 1961, with the approval of the Governor. Passed, on message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Legislative findings. The conditions existing in the school system of the city of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include

—irregularities in the school construction program
—serious hazards in school buildings due to inadequate maintenance and improper repairs
—instances of corruption among employees
—staggering administrative complexities and needless red tape.

The commissioner of education has warned that this is a time of crisis for the New York city schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected.

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EXPLANATION—Matter in *italics* is new; matter in brackets [-] is old law to be omitted.

§ 2. Notwithstanding any other provision of law, on the effective date of this section, the terms of office of the persons then comprising the membership of the board of education of the city school district of the city of New York shall terminate.

§ 3. Notwithstanding the provisions of subdivision two of section twenty-five hundred fifty-three of the education law, as added by section five of this act, the members of the board of education of the city school district of the city of New York shall be appointed to fill the vacancies occurring on the effective date of section two of this act in the manner prescribed by this section.

Within five days after the effective date of this act, the board of regents shall request the following persons to convene with the chancellor of the board of regents as a selection board for the purpose of submitting the names of nominees to the mayor of the city of New York to fill such vacancies:

the president of Columbia University;
the chancellor of the City University of New York;
the president of New York University;
the president of the Association of the Bar of the City of New York;
the president of the New York City Central Trades and Labor Council;
the president of Commerce and Industry Association of New York, Inc.;
the president of the Public Education Association;
the president of the United Parents Associations of New York City, Inc.;
the president of the League of Women Voters of the City of New York;
the president of Citizens Union; and
the president of the Citizens Budget Commission, Inc.

*Appendix V*

To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The chancellor of the board of regents shall be the chairman of such selection board, but he shall not participate in the final selection of the nominees. In the event that the chancellor of the board of regents shall be unable to act, the vice-chancellor of the board of regents shall act in his place.

The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.

At least five days before the effective date of section two of this act, the selection board shall submit a list to the mayor of at least eighteen names of nominees who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. On the effective date of section two of this act, the mayor shall appoint nine persons from among the nominees to be the members of the board of education of the city school district of the city of New York. If the mayor shall fail to make such appointments on the effective date of section two of this act, the state commissioner of education may make such appointments in his place from among the nominees submitted to the mayor.

If the selection board shall submit less than eighteen names of nominees to the mayor five days before the effective date of section two of this act, the mayor shall be required to fill from the names submitted that number of vacancies equal to one-half the number of names submitted disregarding resulting fractions and the mayor may fill any remaining vacancies on the effective date of section two of this act without regard to the provisions of this section.

*Appendix V*

Notwithstanding any other provision of law the terms of office of the members of the board of education appointed on the effective date of section two of this act shall be as follows: the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-two, the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-three, and the terms of office of the remaining members of the board appointed on the effective date of section two of this act shall expire on the first Tuesday of May in nineteen hundred sixty-four, nineteen hundred sixty-five, nineteen hundred sixty-six, nineteen hundred sixty-seven and nineteen hundred sixty-eight, respectively. Each of their successors shall be appointed in the manner specified by the provisions of subdivision two of section twenty-five hundred fifty-three of the education law as added by section five of this act and shall hold office for a term of seven years expiring on the first Tuesday in May, except that in the event of a vacancy occurring other than by expiration of term, the successor shall hold office for the unexpired term.

§ 4. Subdivision one of section twenty-five hundred fifty-three of the education law, as last renumbered and amended by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, is hereby amended to read as follows:

1. No person shall be eligible to the office of member of a board of education who is not a citizen of the United States and who, *in the case of the city school districts of the cities of Buffalo, Rochester, Syracuse, Yonkers and Albany,* has not been a resident of the city school district for which he is chosen for a period of at least three years immediately preceding the date of his election or appointment *and who, in the case of the city school district of the city of New York, is not a resident thereof on the date of his appointment.*

§ 5. Subdivision two of section twenty-five hundred fifty-three of such law, as last amended by chapter two hundred eighty-nine of the laws of nineteen hundred sixty-one, is hereby **repealed** and a new subdivision two is inserted in lieu thereof, to read as follows:

*2. The members of the board of education of the city school district of the city of New York shall be appointed in the manner prescribed by this subdivision.*

*At least twenty-five days prior to the expiration of the term of office of any member, or within ten days after the occurrence of a vacancy otherwise than by expiration of term, the mayor of the city of New York shall request the following persons to convene as a selection board for the purpose of submitting the names of nominees to him for appointment to the board of education:*

*the president of Columbia University;*
*the chancellor of the City University of New York;*
*the president of New York University;*
*the president of the Association of the Bar of the City of New York;*
*the president of the New York City Central Trades and Labor Council;*
*the president of Commerce and Industry Association of New York, Inc.;*
*the president of the Public Education Association;*
*the president of the United Parents Associations of New York City, Inc.;*
*the president of the League of Women Voters of the City of New York;*
*the president of Citizens Union; and*
*the president of the Citizens Budget Commission, Inc.*

*To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The president of*

*the Association of the Bar of the City of New York shall be the chairman of the selection board and shall, forthwith upon receiving the request of the mayor, give notice to the others specified of the time and place of convening. In the event that the president of the Association of the Bar of the City of New York shall be unable to act, the mayor shall designate one of the other persons specified to convene the selection board and to be its chairman.*

*The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.*

*Within fifteen days after the mayor shall have requested a convening of the selection board, it shall nominate to the mayor for each vacancy three to five persons who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. Within ten days after receiving such nominations, the mayor shall appoint from among the nominees one person to fill each vacancy.*

*In the event the selection board shall fail to submit its nominations to the mayor within fifteen days after the mayor shall have requested its convening, the mayor may fill a vacancy without regard to the provisions of this subdivision.*

§ 6. Subdivisions two and three of section twenty-five hundred sixty-four of such law, such section having been so renumbered by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, and subdivision five of such section, as last amended by chapter six hundred thirty-nine of the laws of nineteen hundred sixty-one, are hereby amended to read, respectively as follows:

2. There shall be in each of such districts a local school board of five members appointed by the [president of the borough in which such district is located] *board of education in such city. The board of education shall give at least thirty days notice of its intention to make such appointment or to fill such vacancy as may occur which shall be published in the same manner as notice of public hearings provided that such notice need not contain the name of any prospective appointee. The board of education shall take into consideration in making such appointment the recommendations made to it by community and neighborhood groups active in the local school board district and by representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.* The board of education shall designate as a member of a local school board one member of the board of education and the city superintendent of schools shall assign one assistant superintendent to advise with such board.

3. The term of office of a member of such board shall be five years. A vacancy on such board shall be filled by the [borough president] *board of education* for the unexpired term.

5. A member of a local school board who publicly declares that he will not accept or serve in the office of member of such board, or refuses or neglects to attend three successive meetings of such board, of which he is duly notified, without rendering a good and valid excuse therefor in writing to the chairman or secretary of such board, vacates his office by refusal to serve. It shall be the duty of the remaining members of the local school board to determine by a majority vote whether the excuse is a good and valid one. If they find that the excuse is not a good and valid one, they shall declare said office vacant and shall forthwith notify the board of education [and the borough president] of such vacancy. Thereafter such vacancy shall

be filled by the [borough president. If the borough president neglects at any time to fill any vacancy on the school board within ninety days after he has been notified of such vacancy, then the mayor shall be empowered to fill such vacancy] *board of education.*

§ 7. Such law is hereby amended by adding thereto a new section, to be section twenty-five hundred fifty-four-a, to read as follows:

*§ 2554-a. Special provisions relating to the city school district of the city of New York during emergency period. 1. As used in this section, the term "emergency period" shall mean the period from the effective date of this section to the first day of July, nineteen hundred sixty-two.*

*2. In order to place the educational affairs of the city school district of the city of New York under the closer supervision of the regents and the commissioner during the emergency period, the board of education of such district shall submit to the regents and the commissioner and to the mayor of the city of New York on the first day of January and April, nineteen hundred sixty-two, an interim progress report in such form and detail as the commissioner shall prescribe and on the first day of July, nineteen hundred sixty-two, a final report in such form and detail as the commissioner shall prescribe as to:*

*a. the corrective action taken in the emergency period and planned by the board of education with respect to the administration of the program for new school building construction;*

*b. the corrective action taken in the emergency period and planned by the board of education with respect to the repair and maintenance of existing school buildings and other structures under the control of the school district;*

*c. the disciplinary action taken in the emergency period with respect to employees guilty of accepting gratuities in relation to the performance of their duties, and the corrective action taken by the board of education to prevent recurrences of such misconduct;*

*d. the corrective action taken in the emergency period and planned by the board of education with respect to administrative reform and the development of a program for the division of responsibility between the board and the superintendent of schools and the administrative staff for the more efficient and effective management of the district;*

*e. the plans developed and action taken in the emergency period by the board of education for the revitalization of local school boards and for increased participation of residents throughout the city of New York in the affairs of their local neighborhood schools;*

*f. the plans developed and action taken in the emergency period by the board of education to establish a long-range program and the necessary staff organization for better informed and coordinated planning of new school construction and the modernization of existing structures; and*

*g. the steps taken in the emergency period by the board of education to evaluate and to improve the quality of instruction in the schools.*

*3. During the emergency period, the board of education of the city school district of the city of New York shall have, specifically, the power:*

*a. To undertake any studies, inquiries, surveys or analyses it may deem relevant through the personnel of the district or in cooperation with or by agreement with any other public or private agency;*

*b. To employ and at pleasure remove educational, engineering, architectural, legal or management consultants and such other assistants as it may deem necessary for the performance of its functions and fix their compensation within the amounts made available by appropriation therefor;*

*c. Notwithstanding the provisions of subdivision one of section twenty-five hundred sixty-five of this chapter, to remove at its pleasure by a vote of a majority of all its members, the superintendent, any deputy superintendent or any associate superintendent of schools of the district irrespective of the date of their appointments, provided, however, that the board may enter into a contract with the superintendent of schools for a period of not less than three and not more than five years; and*

*d. To authorize the superintendent of schools and the administrative staff of the district by by-law, rule, regulation or resolution to exercise on its behalf such of its administrative and ministerial powers and duties with respect to the administration of the city school district, the purchase, repair, remodeling, improvement or enlargement of school buildings or other buildings or sites and the construction of new buildings as the board deems necessary or desirable for the more efficient administration of the district or for the more expeditious completion of school construction, maintenance or repairs, provided, however, that the board shall not authorize the superintendent of schools and the administrative staff to exercise any powers and duties relating to its investigative or judicial functions.*

§ 8. Not later than the first day of February, nineteen hundred sixty-two, the state board of regents and the state commissioner of education shall submit to the governor and the legislature specific recommendations for such permanent changes in the laws of the state as they may deem advisable

for the organization and more effective administration of the city school district of the city of New York, including, but not limited to, recommendations as to:

a. The powers necessary to ensure the board of education complete freedom to operate for the best interests of the schools unhampered by restrictive influence and controls.

b. The revitalization of the present system of local school boards in such city school district.

c. The effective participation by the people throughout the city of New York in the government of their local schools.

d. The delineation of functions and responsibilities between members of the board of education and the superintendent of schools and the administrative staff of such city school district.

e. The interrelationship of such city school district and its board of education with official agencies of the city of New York.

f. The construction, maintenance, operation and repair of school buildings and other buildings under the control of such city school district.

§ 9. The sum of one hundred fifty thousand dollars ($150,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for the use of the board of education of the city school district of the city of New York for its expenses, including personal service, in carrying out the reporting provisions of this act, in employing consultants or in undertaking studies, inquiries, surveys

or analyses in relation thereto. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved by the chairman or president of such board of education and by the state commissioner of education.

§ 10. The sum of twenty-five thousand dollars ($25,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for the purpose of enabling the state board of regents and the state commissioner of education to carry out the provisions of section eight of this act. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved as provided by law.

§ 11. This act shall take effect immediately, except that sections two, six and seven shall take effect the thirtieth day following the date of enactment of this act.

## APPENDIX VI

### Notice Of Appeal To The Supreme Court Of The United States

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

File 13538/1961

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VITO F. LANZA and CHARLES F. RANK,

*Plaintiffs-Appellants,*

*against*

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendants-Appellees.*

---

SIRS:

PLEASE TAKE NOTICE of the following:

I. Notice is hereby given that Vito F. Lanza and Charles F. Rank, the appellants above named, hereby appeal to the Supreme Court of the United States from each and all of the following:

(A) The final judgment of the Supreme Court of the State of New York in and for Kings County, entered on October 11, 1961 which dismissed the complaint in this action;

(B) The final judgment of the Supreme Court of the State of New York in and for Kings County, which after appeal to the Appellate Division of said court, affirmed the dismissal of the complaint in this action; and

(C) The order of the Court of Appeals of the State of New York entered in said court on May 17, 1962, which by a divided court modified both said judgments, to the extent of directing judgment in favor of defendants declaring that Chapter 971 of the Laws of 1961 [herein called the "New York State Statute"] is constitutional and adjudging that it was proper for the defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of said statute.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all the papers which are part of the Remittitur returned by the Clerk of the Court of Appeals of the State of New York to the Clerk of the County of Kings, State of New York.

III. The following questions are presented by this appeal.

(A) Whether said New York State Statute violates Art. 1 § 10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any bill of Attainder.

(B) Whether said New York State Statute violates § 4 of the Constitution of the United States, insofar as said section provides that the United States shall guarantee to every State in this Union a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV § 1, of the Constitution of the United States, insofar as said amendment provides that no State

shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law.

Dated: New York City
August 9th, 1962.

VITO F. LANZA
*Attorney for Plaintiffs-Appellants*
32 Court Street
Brooklyn 1, New York

To:

LEO A. LARKIN, Esq.
Corporation Counsel of the City of New York,
*Attorney for Defendant-Appellee,*
Hon. Robert F. Wagner,
Municipal Building,
New York City, N. Y.

Hon. LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
*Attorney for Defendant-Appellee,*
Hon. Louis J. Lefkowitz,
Attorney General of the State of New York
State Office Building,
80 Centre Street,
New York City, N. Y.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 334

VITO F. LANZA and CHARLES F. RANK,

*Petitioners,*

*against*

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI

## BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney pro se*

IRVING GALT
Assistant Solicitor General

SHELDON RAAB
Deputy Assistant Attorney General,

*of Counsel.*

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*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO EITHER OR BOTH OF THE SUPREME COURT OF THE STATE OF NEW YORK AND THE COURT OF APPEALS OF THE STATE OF NEW YORK.

## BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION

### Opinions Below

The opinion of the New York Supreme Court, Kings County, is reported at 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). The memorandum affirmance by the New York Appellate Division, Second Department, is reported at

15 App. Div. 2d 552, 222 N.Y.S. 2d 1019 (1961). The opinion of the New York Court of Appeals and the dissenting opinions are reported at 11 N.Y. 2d 317, 183 N. E. 2d 670 (1962). These opinions are printed as Appendices II, III and IV, respectively, of the Petition. In addition, an unreported oral opinion of the New York Supreme Court, Kings County, handed down one week prior to the reported opinion, is printed as Appendix I of the Petition.

## Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3) which, to the extent here pertinent, provides:

> "§ 1257. State courts; appeal; certiorari
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari • • • where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution • • • of the United States • • •."

## Statutes and Constitutional Provisions Involved

The statute here challenged by petitioners is Chapter 971 of the New York Laws of 1961, set forth in Appendix A of this brief. Chapter 971 repealed and replaced the former New York Education Law § 2553(2), printed as Appendix B of this brief.

The provisions of the federal Constitution now relied upon by petitioners are (1) Article I, § 10; (2) Article IV, § 4; and (3) Amendment XIV, § 1; the pertinent parts of which are set forth in the Petition, p. 3.

## Questions Presented

Whether petitioners' claim that the statutory termination of their terms of office as unsalaried members of the board of education for the City of New York violates either (A) the due process clause of the fourteenth amendment or (B) the constitutional prohibition against bills of attainder, presents a federal question of any substance?

Whether the New York State statute involved, insofar as it provides for a method of appointment of new members of the board of education, is open to challenge by the petitioners once it has been determined that their terms of office have been validly terminated?

Whether petitioners can now raise any question based on Article IV, § 4, of the United States Constitution, in view of their failure to raise any such federal question in the New York courts?

Whether, even if otherwise properly presented, petitioners' claim that the statute's provision for appointment of members of the board of education violates (A) the guaranty to each state of a republican form of government, Article IV, § 4, (B) the equal protection clause of the fourteenth amendment, or (C) any other clause of the United States Constitution, raises any substantial federal question?

Whether petitioner Lanza has standing to raise *any* question, in view of the fact that even if the challenged statute had not been enacted his term of office as a member of the board of education would have expired in May, 1962?

## Statement

Petitioners here seek review of a judgment of the New York Court of Appeals upholding the constitutionality of a statute (Chapter 971 of the New York Laws of 1961) reorganizing and reconstituting the board of education for the City of New York.

The Legislature enacted Chapter 971 at an Extraordinary Session which was convened by the Governor on August 21, 1961, for the purpose of taking remedial action with respect to certain serious problems and conditions existing in the educational system of the City of New York.

The New York Legislature noted, in Section 1 of the challenged statute, that "conditions existing in the school system of the City of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action." These conditions, the Legislature declared, include "irregularities in the school construction program—serious hazards in school buildings due to inadequate maintenance and improper repairs—instances of corruption among employees—staggering administrative complexities and needless red tape." Further, the preamble points out that "the educational well-being of almost one million children is directly affected" and that the commissioner of education "has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action" (Laws of N. Y., 1961, ch. 971, § 1).

In the Legislature's judgment, the prevailing situation made it imperative that a new board of education be appointed and that corrective action be undertaken as expeditiously as possible. To this end, provision was made for the prompt appointment of a new board of education for the City of New York from a list of nominees to be submitted to the Mayor by a selection panel composed of leaders of representative educational, civic, business, labor and professional groups interested in the field of education. By this means, the Legislature established a method of selection designed to secure "persons of outstanding experience, competence and qualification for service on the board of education." The statute specified that the terms of office of the incumbents should expire, and those of the new members begin, on September 20, 1961 (*id.*, §§ 2 and 3).

In addition, the statute strengthened the powers of the board of education and provided for a system of close supervision of the educational affairs of the city school district of New York City by the regents and the commissioner of education during an "emergency period" which was to continue until July 1, 1962 (*id.*, § 7).

Chapter 971 of the Laws of 1961 repealed and replaced the former New York Education Law § 2553(2), which had provided for a board of education for New York City, consisting of nine members appointed by the Mayor. Petitioners are two former members of the board of education whose appointments antedated the enactment of Chapter 971 and whose terms of office otherwise would not have expired until May 1962 and sometime in 1964, respectively. They brought this action on September 19, 1961 (the day before the deadline for the Mayor to make his appointments to the new board) for a judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from making appointments to the board "in [petitioners'] place and stead."

The New York Supreme Court, Kings County, finding no merit to any of the plaintiffs' contentions denied the application for a temporary injunction and dismissed the complaint. 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). The Appellate Division unanimously affirmed. 15 A. D. 2d 552, 222 N.Y.S. 2d 1019 (1961). On appeal to the Court of Appeals of the State of New York the validity of the statute again was upheld. 11 N. Y. 2d 317, 183 N. E. 2d 670 (1962). The Court of Appeals modified the judgment, however, to accord with New York practice, by affirmatively granting declaratory judgment for defendants instead of merely dismissing plaintiffs' complaint. Accordingly, judgment was directed in favor of the defendants (respondents herein) (1) declaring that Chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the board of education in accordance with the provisions of the statute.

The decision in the Court of Appeals was by a 4-3 vote. Contrary to petitioners' implication that there was a division in the Court of Appeals over the questions now raised in this Petition (see Petition p. 5), the sole ground for dissent in the Court of Appeals was a state ground—Article III, § 1, of the New York State Constitution. The dissenters viewed the statute's provisions for appointment of new members of the board of education as an unconstitutional relinquishment of legislative power in violation of that section. 11 N. Y. 2d at 334, 340; 183 N. E. 2d at 680, 683. There was no disagreement among the judges with respect to any of the federal constitutional questions raised in the Petition.

## Argument

The federal questions raised by this petition are utterly without merit. Having failed in the New York courts, where their contentions based upon the federal Constitution were given short shrift even by the dissenting judges in the Court of Appeals, petitioners now seek review of questions which, particularly in light of prior decisions of this Court, can only be regarded as frivolous.

Before proceeding to a discussion of the frivolity of the questions raised by the petition, it should be noted that petitioner Lanza would appear to have no standing to raise *any* question at this time, since even if Chapter 971 of the New York Laws of 1961 had not been enacted, his term of office as a member of the board of education for New York City would have expired in May, 1962 (See Complaint, par. 7).

As for petitioners' grievances, it would appear that they center about (1) the termination of their tenure of office and (2) the fact that they were not appointed to the reconstituted board. Neither grievance can be made into a federal question even remotely deserving of review by this Court on certiorari.

## I. The statutory termination of petitioners' terms of office is clearly constitutional.

Petitioners attack the validity of the statute's termination of their terms of office as (1) a denial of due process, in violation of the fourteenth amendment, and (2) a bill of attainder, in violation of Article I, § 10, of the Constitution of the United States.

The office held by each of the petitioners was created by the New York State Legislature, and was subject to regulation solely by that Legislature. There is no constitutional inhibition, state or federal, against the mere shortening by the Legislature of the term of an existing statutory office—especially where (as here) the office-holder serves without compensation. See *Dodge* v. *Board of Education of Chicago*, 302 U. S. 74, 78-79 (1937); *Long* v. *Mayor of City of New York*, 81 N. Y. 425, 427-428 (1887). Nor was the instant statute a product of a vindictive state of mind as petitioners seem to suggest; it was designed as a means of providing prompt corrective action in connection with conditions in the school system of the City of New York which had given rise to grave concern on the part of the Legislature. (See Laws of N. Y., 1961, ch. 971 § 1). In an attempt to assure expeditious correction of these conditions, the Legislature inaugurated a new method for selecting the board of education and conferred additional powers, previously lacking, on the new board (*id.*, §§ 6, 7, 8). Petitioners' claim that the statute deprives them of a right to due process is frivolous.

Similarly, petitioners' contention that the statute is actually a bill of attainder is without substance. There is no basis whatever for the charge that either the purpose or effect of Chapter 971 of the Laws of 1961 was to punish or impeach petitioners or any other incumbent member of the former board, or to render them ineligible for consideration as potential appointees to the new board. The

legitimate purposes of the statute—expeditious correction of deleterious conditions in the New York City School system and the creation of a new, more effective and efficient board of education—are plain for all to see.

This statute has none of the objectionable characteristics of a bill of attainder. An attainder inflicts *punishment* without a judicial trial. See *United States* v. *Lovett*, 328 U. S. 303, 315, 324 (1941); *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 323 (1867); *Garner* v. *Los Angeles Bd. of Public Works*, 341 U. S. 716, 722 (1951); *Communist Party* v. *Subversive Control Bd.*, 367 U. S. 1, 82-88 (1961). Nowhere does this statute bar petitioners from consideration for appointment to the new board of education. Nor does it disqualify them from holding public office, as did the legislation struck down in *United States* v. *Lovett*, *supra*, relied upon by petitioners. The *Lovett* case is wholly inapposite to the case at bar—here these *unsalaried* officials have not been deprived of any property right. Indeed, their major argument appears to be that they were attainted because others, rather than they, were appointed to the new board of education; that contention, of course, is patently absurd.

## II. The statute's provisions for appointment of new members of the board of education are clearly constitutional and, in any event, petitioners have no standing to challenge them in this Court.

Petitioners' pique at not being appointed to the new board of education is reflected in their attack on the statute's provisions for appointment to the new board of education as violative of (1) the "Guaranty Clause," Article IV, § 4, of the United States Constitution, and (2) the equal protection clause of the fourteenth amendment.

Not only are these contentions frivolous, but petitioners lack standing even to raise them. First, if petitioners'

terms of office were validly terminated, they hardly could be aggrieved by the use of any method of selecting the members of the new board. Second, in the case of the argument based on the Guaranty Clause, petitioners are attempting to raise a federal question for the first time in this Court. Nowhere in the pleadings or briefs before any of the New York State courts does it appear that Article IV, § 4, of the United States Constitution was drawn into question. In none of the opinions handed down by the New York courts is there any discussion of the Constitutional guaranty to each state of a republican form of government. This failure to raise the federal question in the state court proceeding is itself sufficient reason for the court to decline review. Cf. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York Central R.R.* v. *New York*, 186 U. S. 269, 273 (1902); REVISED RULES OF THE SUPREME COURT, Rule 23 (1)(f).

Even if the petitioners' argument had been raised before the New York courts it would at most raise a non-justiciable issue and would not present a basis for invalidating state action. *Baker* v. *Carr*, 369 U. S. 186, 223-24 (1962); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74 (1930).

And, even if justiciable, these arguments would be frivolous. Petitioners' proposition is apparently, that because the statute provides for the Mayor to appoint members of the board of education from a list of nominees submitted by a panel of "private" persons, it somehow violates the clause guaranteeing a republican form of government. The far-fetched nature of this contention should be plain. It is transparently an attempt to make a federal question out of the one issue in the case—the question of the constitutionality of the method of appointment provided for by the statute—with which the Court of Appeals had some difficulty. The difficulty however, was caused solely by a provision of the New York State Con-

stitution. This clause, Article III, § 1, provides that "the legislative power of this State shall be vested in the Senate and Assembly." The dissents in the Court of Appeals were on the single ground that the statute's provisions for appointment amounted to an impermissible relinquishment of legislative power in violation of this provision of the state constitution. 11 N. Y. 2d at 334, 340; 183 N. E. 2d at 680, 683.

No federal ground was raised in opposition to the provisions for nomination by the selection board in the court below, and it is impossible to see any ground which could reasonably have been raised. The question of the New York State Legislature's power to prescribe the method by which offices created by that Legislature shall be filled is a question for the New York courts to determine. The majority of the Court of Appeals, in an opinion amply supported by reason and authority, found no delegation of legislative authority (11 N. Y. 2d 317, 327-334, 183 N. E. 2d 670, 676-680. In the words of that Court:

> "whether we regard the selection board as 'private' or 'public', we perceive no constitutional bar to the legislative designation of a nominating panel, made up of people representing a knowledgeable cross section of city interests, either active or vitally interested in the educational life of the city, who could reasonably be expected to present to the mayor, on an objective and non-partisan basis, the names of individuals exceptionally qualified for service on the board of education."

(11 N. Y. 2d at 333; 183 N. E. 2d at 679).

Even assuming, *arguendo*, that the statute's provisions for appointment are somehow reviewable by this Court, their constitutionality is clear. Traditionally, appointments are within the domain of executive action; this remains the case where, as here, a public officer, the Mayor of the City of New York, makes the actual choice from among the nominees offered by the panel. *Sunshine Coal*

*Co.* v. *Adkins*, 310 U. S. 381, 399 (1940). In view of the fact that the Legislature here has not delegated governmental powers to a previously existing non-governmental group, but rather has designated a number of individuals, previously unrelated to each other, to make up a new governmental body with specific responsibilities in the field of education, it seems incongruous to characterize the panel or its members as "private". They appear no less "public" in the performance of their special statutory function of providing nominees than any other officers of government. Moreover, even if the panel could conceivably be classed as "private" this would in no way affect the validity of their action. See *Cusack* v. *City of Chicago*, 242 U. S. 526 (1917); *St. Louis Iron Ry.* v. *Taylor*, 210 U. S. 281 (1908).

To be sure, statutory delegation might in some extreme cases threaten basic concepts of fairness. For example, statutes which give certain occupational groups the right to exclude others from the same occupation may impair due process. Even this principle, however, is subject to sharp qualification in the case of professional groups, *e.g.*, the activities of character committees in approving applicants for admission to the Bar, and examination and licensing by boards of experts in other professions. See *e.g.*, New York Education Law §§ 6607, 6703, 6802. But, certainly, where an agency has no licensing or regulatory functions whatever, and merely recommends nominees from among whom a public official will make the ultimate appointments, due process is not violated. Since there exists no danger of unwarranted restrictions on outsiders or abuse of power resulting from lack of political responsibility, no reason remains for suspecting a constitutional defect in the statutory selection procedure. See *Cusack Co.* v. *City of Chicago*, 242 U. S. 526 (1917) *supra*; DAVIS, ADMINISTRATIVE LAW, 71-72, 87 (1951 Ed.).

Petitioners' contention that the *administration* of the statute somehow deprives them of the equal protection

of the laws is without any substance whatever. How the allegation—unsupported by the record—that petitioners were not considered by the selection panel for appointment to the new board of education can be made the basis of a claim of unconstitutionality is simply beyond comprehension. It is clear from the statute that petitioners were and are not barred from consideration by the selection panel. As possible nominees for appointment to the new board, they stand on no different footing from anybody else.

## CONCLUSION

**For the reasons stated, this petition for a writ of certiorari should be denied.**

Dated: New York, New York, September 12, 1962.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney pro se*

IRVING GALT
Assistant Solicitor General

SHELDON RAAB,
Deputy Assistant Attorney General,
*of Counsel.*

## APPENDIX A

### Laws of New York, 1961, Chapter 971

AN ACT to amend the education law, in relation to reconstituting the board of education for the city school district of the city of New York, providing for the emergency supervision of such district, and making appropriations in relation thereto

Became a law August 21, 1961, with the approval of the Governor. Passed, on message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Legislative findings. The conditions existing in the school system of the city of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include

—irregularities in the school construction program

—serious hazards in school buildings due to inadequate maintenance and improper repairs

—instances of corruption among employees

—staggering administrative complexities and needless red tape.

The commissioner of education has warned that this is a time of crisis for the New York city schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected.

§ 2. Notwithstanding any other provision of law, on the effective date of this section, the terms of office of the persons then comprising the membership of the board of education of the city school district of the city of New York shall terminate.

§ 3. Notwithstanding the provisions of subdivision two of section twenty-five hundred fifty-three of the education

law, as added by section five of this act, the members of the board of education of the city school district of the city of New York shall be appointed to fill the vacancies occurring on the effective date of section two of this act in the manner prescribed by this section.

Within five days after the effective date of this act, the board of regents shall request the following persons to convene with the chancellor of the board of regents as a selection board for the purpose of submitting the names of nominees to the mayor of the city of New York to fill such vacancies:

the president of Columbia University;

the chancellor of the City University of New York;

the president of New York University;

the president of the Association of the Bar of the City of New York;

the president of the New York City Central Trades and Labor Council;

the president of Commerce and Industry Association of New York, Inc.;

the president of the Public Education Association;

the president of the United Parents Associations of New York City, Inc.;

the president of the League of Women Voters of the City of New York;

the president of Citizens Union; and

the president of the Citizens Budget Commission, Inc.

To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The chancellor

of the board of regents shall be the chairman of such selection board, but he shall not participate in the final selection of the nominees. In the event that the chancellor of the board of regents shall be unable to act, the vice-chancellor of the board of regents shall act in his place.

The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.

At least five days before the effective date of section two of this act, the selection board shall submit a list to the mayor of at least eighteen names of nominees, who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. On the effective date of section two of this act, the mayor shall appoint nine persons from among the nominees to be the members of the board of education of the city school district of the city of New York. If the mayor shall fail to make such appointments on the effective date of section two of this act, the state commissioner of education may make such appointments in his place from among the nominees submitted to the mayor.

If the selection board shall submit less than eighteen names of nominees to the mayor five days before the effective date of section two of this act, the mayor shall be required to fill from the names submitted that number of vacancies equal to one-half the number of names submitted disregarding resulting fractions and the mayor may fill any remaining vacancies on the effective date of section two of this act without regard to the provisions of this section.

Notwithstanding any other provision of law the terms of office of the members of the board of education appointed on the effective date of section two of this act shall be as follows: the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-two, the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-three, and the terms of office of the remaining members of the board appointed on the effective date of section two of this act shall expire on the first Tuesday of May in nineteen hundred sixty-four, nineteen hundred sixty-five, nineteen hundred sixty-six, nineteen hundred sixty-seven and nineteen hundred sixty-eight, respectively. Each of their successors shall be appointed in the manner specified by the provisions of subdivision two of section twenty-five hundred fifty-three of the education law as added by section five of this act and shall hold office for a term of seven years expiring on the first Tuesday in May, except that in the event of a vacancy occurring other than by expiration of term, the successor shall hold office for the unexpired term.

§ 4. Subdivision one of section twenty-five hundred fifty-three of the education law, as last renumbered and amended by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, is hereby amended to read as follows:

1. No person shall be eligible to the office of member of a board of education who is not a citizen of the United States and who, *in the case of the city school districts of the cities of Buffalo, Rochester, Syracuse, Yonkers and Albany,* has not been a resident of the city school district for which he is chosen for a period of at least three years immediately preceding the date of his election or appointment *and who, in the case of the city school district of the*

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EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

*city of New York, is not a resident thereof on the date of his appointment.*

§ 5. Subdivision two of section twenty-five hundred fifty-three of such law, as last amended by chapter two hundred eighty-nine of the laws of nineteen hundred sixty-one, is hereby **repealed*** and a new subdivision two is inserted in lieu thereof, to read as follows:

*2. The members of the board of education of the city school district of the city of New York shall be appointed in the manner prescribed by this subdivision.*

*At least twenty-five days prior to the expiration of the term of office of any member, or within ten days after the occurrence of a vacancy otherwise than by expiration of term, the mayor of the city of New York shall request the following persons to convene as a selection board for the purpose of submitting the names of nominees to him for appointment to the board of education:*

*the president of Columbia University;*

*the chancellor of the City University of New York;*

*the president of New York University;*

*the president of the Association of the Bar of the City of New York;*

*the president of the New York City Central Trades and Labor Council;*

*the president of Commerce and Industry Association of New York, Inc.;*

---

* NOTE—Subdivision 2 of Section 2553 of the Education Law, repealed by this act, provides for the appointment of members of the board of education of the city school district of the city of New York by the mayor of said city. Such provisions will be superseded on the effective date of this act by new subdivision 2 of Section 2553.

*the president of the Public Education Association;*

*the president of the United Parents Associations of New York City, Inc.;*

*the president of the League of Women Voters of the City of New York;*

*the president of Citizens Union; and*

*the president of the Citizens Budget Commission, Inc.*

*To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The president of the Association of the Bar of the City of New York shall be the chairman of the selection board and shall, forthwith upon receiving the request of the mayor, give notice to the others specified of the time and place of convening. In the event that the president of the Association of the Bar of the City of New York shall be unable to act, the mayor shall designate one of the other persons specified to convene the selection board and to be its chairman.*

*The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.*

*Within fifteen days after the mayor shall have requested a convening of the selection board, it shall nominate to the mayor for each vacancy three to five persons who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. Within ten days after receiving such nominations, the mayor shall appoint from among the nominees one person to fill each vacancy.*

*In the event the selection board shall fail to submit its nominations to the mayor within fifteen days after the mayor shall have requested its convening, the mayor may*

*fill a vacancy without regard to the provisions of this subdivision.*

§6. Subdivisions two and three of section twenty-five hundred sixty-four of such law, such section having been so renumbered by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, and subdivision five of such section, as last amended by chapter six hundred thirty-nine of the laws of nineteen hundred sixty-one, are hereby amended to read, respectively as follows:

2. There shall be in each of such districts a local school board of five members appointed by the [president of the borough in which such district is located] *board of education in such city. The board of education shall give at least thirty days notice of its intention to make such appointment or to fill such vacancy as may occur which shall be published in the same manner as notice of public hearings provided that such notice need not contain the name of any prospective appointee. The board of education shall take into consideration in making such appointment the recommendations made to it by community and neighborhood groups active in the local school board district and by representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.* The board of education shall designate as a member of a local school board one member of the board of education and the city superintendent of schools shall assign one assistant superintendent to advise with such board.

3. The term of office of a member of such board shall be five years. A vacancy on such board shall be filled by the [borough president] *board of education* for the unexpired term.

5. A member of a local school board who publicly declares that he will not accept or serve in the office of mem-

ber of such board, or refuses or neglects to attend three successive meetings of such board, of which he is duly notified, without rendering a good and valid excuse therefor in writing to the chairman or secretary of such board, vacates his office by refusal to serve. It shall be the duty of the remaining members of the local school board to determine by a majority vote whether the excuse is a good and valid one. If they find that the excuse is not a good and valid one, they shall declare said office vacant and shall forthwith notify the board of education [and the borough president] of such vacancy. Thereafter such vacancy shall be filled by the [borough president. If the borough president neglects at any time to fill any vacancy on the school board within ninety days after he has been notified of such vacancy, then the mayor shall be empowered to fill such vacancy] *board of education.*

§ 7. Such law is hereby amended by adding thereto a new section, to be section twenty-five hundred fifty-four-a, to read as follows:

*§ 2554-a. Special provisions relating to the city school district of the city of New York during emergency period. 1. As used in this section, the term "emergency period" shall mean the period from the effective date of this section to the first day of July, nineteen hundred sixty-two.*

*2. In order to place the educational affairs of the city school district of the city of New York under the closer supervision of the regents and the commissioner during the emergency period, the board of education of such district shall submit to the regents and the commissioner and to the mayor of the city of New York on the first day of January and April, nineteen hundred sixty-two, an interim progress report in such form and detail as the commis-*

*sioner shall prescribe and on the first day of July, nineteen hundred sixty-two, a final report in such form and detail as the commissioner shall prescribe as to:*

*a. the corrective action taken in the emergency period and planned by the board of education with respect to the administration of the program for new school building construction;*

*b. the corrective action taken in the emergency period and planned by the board of education with respect to the repair and maintenance of existing school buildings and other structures under the control of the school district;*

*c. the disciplinary action taken in the emergency period with respect to employees guilty of accepting gratuities in relation to the performance of their duties, and the corrective action taken by the board of education to prevent recurrences of such misconduct;*

*d. the corrective action taken in the emergency period and planned by the board of education with respect to administrative reform and the development of a program for the division of responsibility between the board and the superintendent of schools and the administrative staff for the more efficient and effective management of the district;*

*e. the plans developed and action taken in the emergency period by the board of education for the revitalization of local school boards and for increased participation of residents throughout the city of New York in the affairs of their local neighborhood schools;*

*f. the plans developed and action taken in the emergency period by the board of education to establish a long-range program and the necessary staff organization for better informed and coordinated planning of new school construction and the modernization of existing structures; and*

*g. the steps taken in the emergency period by the board of education to evaluate and to improve the quality of instruction in the schools.*

*3. During the emergency period, the board of education of the city school district of the city of New York shall have, specifically, the power:*

*a. To undertake any studies, inquiries, surveys or analyses it may deem relevant through the personnel of the district or in coöperation with or by agreement with any other public or private agency;*

*b. To employ and at pleasure remove educational, engineering, architectural, legal or management consultants and such other assistants as it may deem necessary for the performance of its functions and fix their compensation within the amounts made available by appropriation therefor;*

*c. Notwithstanding the provisions of subdivision one of section twenty-five hundred sixty-five of this chapter, to remove at its pleasure by a vote of a majority of all its members, the superintendent, any deputy superintendent or any associate superintendent of schools of the district irrespective of the date of their appointments, provided, however, that the board may enter into a contract with the superintendent of schools for a period of not less than three and not more than five years; and*

*d. To authorize the superintendent of schools and the administrative staff of the district by by-law, rule, regulation or resolution to exercise on its behalf such of its administrative and ministerial powers and duties with respect to the administration of the city school district, the purchase, repair, remodeling, improvement or enlargement of school buildings or other buildings or sites and the construction of new buildings as the board deems necessary*

*or desirable for the more efficient administration of the district, or for the more expeditious completion of school construction, maintenance or repairs; provided, however, that the board shall not authorize the superintendent of schools and the administrative staff to exercise any powers and duties relating to its investigative or judicial functions.*

§ 8. Not later than the first day of February, nineteen hundred sixty-two, the state board of regents and the state commissioner of education shall submit to the governor and the legislature specific recommendations for such permanent changes in the laws of the state as they may deem advisable for the organization and more effective administration of the city school district of the city of New York, including, but not limited to, recommendations as to:

a. The powers necessary to ensure the board of education complete freedom to operate for the best interests of the schools unhampered by restrictive influence and controls.

b. The revitalization of the present system of local school boards in such city school district.

c. The effective participation by the people throughout the city of New York in the government of their local schools.

d. The delineation of functions and responsibilities between members of the board of education and the superintendent of schools and the administrative staff of such city school district.

e. The interrelationship of such city school district and its board of education with official agencies of the city of New York.

f. The construction, maintenance, operation and repair of school buildings and other buildings under the control of such city school district.

§ 9. The sum of one hundred fifty thousand dollars ($150,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for he use of the board of education of the city school district of the city of New York for its expenses, including personal service, in carrying out the reporting provisions of this act, in employing consultants or in undertaking studies, inquiries, surveys or analyses in relation thereto. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved by the chairman or president of such board of education and by the state commissioner of education.

§ 10. The sum of twenty-five thousand dollars ($25,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for the purpose of enabling the state board of regents and the state commissioner of education to carry out the provisions of section eight of this act. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved as provided by law.

§ 11. This act shall take effect immediately, except that sections two, six and seven shall take effect the thirtieth day following the date of enactment of this act.

## APPENDIX B

**Former New York Education Law § 2553(2). (Prior to repeal by Laws of N. Y., 1961, Ch. 971).**

§ 2553. Board of education; eligibility; how chosen; term of office; vacancies.

* * *

2. In the city school district of the city of New York there shall be a board of education consisting of nine members, who shall be appointed by the mayor. Two members of such board shall be residents of the borough of Manhattan, two shall be residents of the borough of Brooklyn, two shall be residents of the borough of the Bronx, two shall be residents of the borough of Queens, and one shall be a resident of the borough of Richmond. The term "resident" as used in this subdivision shall mean a person who has resided and been a qualified voter in said borough for at least three years immediately preceding the time of his appointment. The term of office of each member of such board shall be seven years and shall expire on the first Tuesday in May. As vacancies occur on such board they shall be filled from the several boroughs so that each borough shall always be represented on such board as required under this subdivision. A vacancy occurring otherwise than by expiration of term shall be filled for the unexpired term.

* * *

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 334

VITO F. LANZA and CHARLES F. RANK,

*Petitioners,*

*against*

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Respondents.*

## BRIEF OF RESPONDENT WAGNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEO A. LARKIN,
*Attorney for Respondent Wagner,*
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
*of Counsel.*

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IN THE

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*Petitioners,*

*against*

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*Respondents.*

---

## BRIEF OF RESPONDENT WAGNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Questions Presented

The petition for a writ of certiorari presents the following questions:

1. Are substantial constitutional questions worthy of review by this Court presented by the petitioners' contention that Chapter 971 of the New York Laws of 1961, by providing for the termination of the petitioners' terms of office as members of the Board of Education of the City of New York on September 20, 1961, violates (1) the due process clause of the fourteenth amendment, and (2) the provisions of the United States Constitution (Art. 1, § 10) that no State shall pass any bill of attainder?

2. Do petitioners have standing in this Court to assert that the statute, insofar as it provides for the method of

nomination and appointment of new school board members, is violative of Art. IV, § 4 of the United States Constitution which guarantees to each State a republican form of government; and if so, does such assertion present a substantial justiciable issue?

3. Does the petitioners' contention that the statutory provision for the selection and appointment of new school board members denies them the equal protection of the laws present a substantial federal question?

## Statement

On August 21, 1961, the Legislature of the State of New York, at an Extraordinary Session convened by the Governor for the specific purpose of dealing with conditions then existing in the public school system of the City of New York, enacted Chapter 971 of the New York Laws of 1961, which reorganized and reconstituted the school board of the City of New York. In its enactment the Legislature found and declared that "The conditions existing in the school system of the City of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include — irregularities in the school construction program — serious hazards in school buildings due to inadequate maintenance and improper repairs — instances of corruption among employees — staggering administrative complexities and needless red tape. The commissioner of education has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected." (§ 1).

To cope with this situation the Legislature determined that the appointment of school board members from lists of nominees submitted to the Mayor by a selection panel composed of the responsible officers of representative educa-

tional, civic, business, labor and professional organizations active or interested in the field of education would be calculated to result in the appointment of persons of outstanding experience, competence and qualification for service on the board of education (Laws of New York, 1961, ch. 971, §§ 3, 5). It likewise was the judgment of the Legislature that such method of selection and appointment should promptly be put into effect so that public confidence might be restored and conditions in the school system alleviated as expeditiously as possible (id., § 3). The prompt institution of this new method of selection was further indicated by the fact that the Legislature intended to grant emergency powers to the board of education to deal with the emergency situation (id., §§ 6, 7). Accordingly, the Legislature provided that a new board of education, selected in the new manner, be appointed within 30 days and that the terms of office of the persons then comprising the membership of the Board of Education simultaneously terminate.

On September 18, 1961, the petitioners, whose terms as members of the Board of Education of the City of New York would, pursuant to the terms of § 2 of such statute, terminate on September 20, 1961, commenced an action for a declaratory judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from appointing new board members in the place and stead of the petitioners, pursuant to the provisions of the statute. In their complaint, the petitioners made the conclusory allegation that the statute was unconstitutional and void in purporting (1) to terminate the balance of their terms of office on September 20, 1961, and (2) to provide that new members shall be nominated and appointed by the Mayor in the manner provided by the statute. They alleged that "under the provisions of the Home Rule Amendment to the Constitution of the State of New York [N.Y. Const., Art. IX, § 9] and the provisions of the City Charter of the City of New York, Plaintiffs have a legal and constitutional right to serve out

the balance of their terms as members of the said Board of Education, and the Defendant, Mayor of the City of New York, is without legal or constitutional authority to appoint new members of the said Board of Education in the place and stead of the Plaintiffs."

On the following day, in an application to the New York Supreme Court, Kings County, for a temporary injunction restraining the imminent appointment of new members of the board of education by the Mayor, the petitioners' primary argument against the valadity of the statute was its alleged conflict with the home rule (Art. IX, § 9) provisions of the New York State Constitution. Only in response to questions by the Court did they allege generally that the statute was in the nature of a bill of attainder and that it was violative of the fourteenth amendment. The New York Supreme Court, Kings County, denied the application for the temporary injunction and dismissed the complaint as being without merit. 30 Misc 2d 212, 220 N.Y.S. 2d 477 (1961). In their appeal to the Appellate Division, the petitioners abandoned the contention that the statute was a bill of attainder. The Appellate Division unanimously affirmed the dismissal of the complaint. 15 AD 2d 552, 222 N.Y.S. 2d 1019 (1961). On appeal to the Court of Appeals of the State of New York the statute was again upheld. However, to conform to New York practice, the judgment below dismissing the complaint was modified to provide judgment for the defendants declaring that (1) Chapter 971 of the Laws of 1961 is constitutional, and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of the statute. 11 NY 2d 317, 183 N.E. 2d 670 (1962).

## POINT I

**Chapter 971 of the New York Laws of 1961, by providing for the termination of the petitioners' terms of office on September 20, 1961, did not deprive petitioners of due process nor was it a bill of attainder.**

### (1)

The petitioners' office, having been created by statute rather than by the Constitution of the State of New York, was, in the absence of specific constitutional inhibition, subject to the plenary jurisdiction of the Legislature. A legislature, acting in the public interest and addressing itself to the office rather than at the incumbent; can abolish or shorten the term of an office of its creation notwithstanding such action may curtail the incumbent's unexpired term. Public offices are created for the benefit of the public and not granted for the benefit of the incumbent, and the officeholder has no contractual, vested or property right in the office. *Phelps* v. *Board of Education of West New York*, 300 U. S. 319, 323 (1937); *Dodge* v. *Board of Education of Chicago*, 302 U. S. 74, 78-79 (1937); *Conner* v. *City of New York*, 5 N. Y. 285, 295-296 (1851); *Long* v. *Mayor, etc. of City of New York*, 81 N. Y. 425, 427-428 (1880).

That the legislation complained of was aimed at the office, not the incumbents, is indisputable. The emergency conditions in the public schools in the City of New York required prompt corrective action. It was the duty of the Legislature to take all reasonable and necessary measures to alleviate the conditions. The obvious answer to any claim by the petitioners that the constitutional provision for due process protects officeholders against arbitrary and whimsical action even when their holding of public office does not involve contractual, vested or property rights (see *Wieman* v. *Updegraff*, 344 U. S. 183, 192 [1952]) is that the action herein cannot be so characterized.

**(2)**

The petitioners' attack on the statute as being a bill of attainder is similarly without merit. Neither the purpose nor the effect of the statute was to punish incumbent school board members. As was hereinabove pointed out, the termination of the petitioners' term of office was an unavoidable result of proper legislative action affecting the positions which they held. General legislation such as the statute herein, designed solely to provide a more effective and efficient body, and aimed at the office of school board members rather than at the incumbent officeholders, has none of the characteristics of a bill of attainder (see *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722 [1951]).

*United States* v. *Lovett*, 328 U. S. 303 (1946), cited by petitioners in support of their contention that the instant statute is a bill of attainder (Petition, p. 8), is on its face clearly distinguishable from the case of bar. In fact, it becomes readily discernible from a mere reading of that decision that the challenged statute has none of the attributes of a bill of attainder. In the *Lovett* case, the House of Representatives, following a so-called investigation of certain individuals, found them guilty of "subversive" activities, and thereupon provided in an appropriation bill that such persons be forever barred from federal employment. Thus, the clear purpose and effect of the legislation was solely the punishment of these individuals by disqualifying them from all future federal employment. In the case at bar, the petitioners had never been charged with or found guilty of wrongdoing nor have they been barred or disqualified from holding any office or employment. They have not been barred from or held ineligible for consideration for or appointment as school board members in accordance with the newly devised method of selection and appointment of board members. The petitioners, who had no vested or other right to be members of either the old or new Board of Education may not complain simply because they were not selected or appointed to the new board.

## POINT II

**Petitioners have no standing in this Court to challege the statutory provisions for the nomination and appointment of school board members based on Art. IV, § 4 of the United States Constitution which guarantees to each state a republican form of government. In any event, the statute does not present any substantial constitutional questions either under (1) the guaranty clause (Art. IV, § 4) or (2) the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution.**

### (1)

The claim that the statutory provisions for the nomination and appointment of school board members violate the Guaranty Clause of the United States Constitution is being raised by the petitioners for the first time in this Court. In none of the pleadings, briefs or arguments below was this issue raised nor did any of the New York courts discuss or pass upon this question. Such failure to raise the federal question in the state courts precludes its consideration at this time. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York Central R.R.* v. *New York*, 186 U. S. 269, 273 (1902); Revised Rules of the United States Supreme Court, Rule 23 (1) (f). Moreover, since the terms of office of the petitioners were validly terminated by Chapter 971 of the New York Laws of 1961, the petitioners do not have the specific interest or aggrievement necessary to challenge the statutory provisions relating to the nomination and appointment of new school board members. *Dorsey* v. *Stuyvesant* Town Corp., 299 N. Y. 512, 521 (1949), cert. denied, 339 U. S. 981 (1950). Petitioner Lanza, whose term of office as a member of the board of education of the City of New York would have expired in May, 1962 even if Chapter 971 of the New York Laws of 1961 had not been enacted (Complaint, par. 7), has no standing at this time to raise *any* questions and the proceeding as to him is moot.

The only questions which the petitioners raised in the Court below with respect to the statutory provisions for the nomination and appointment of school board members were two purely state questions. One was whether there was a violation of the home rule provisions (Art. IX, § 9) of the New York State Constitution, and the other was whether there was an unlawful delegation of legislative authority in violation of Art. III, § 1 of the State Constitution that "the legislative power of this state [New York] shall be vested in the senate and assembly." The petitioners may not now seek to subvert these purely state questions concerning the validity of legislation under a state constitution into a federal question regarding the republican form of government of a state. The decision by the Court of Appeals of the State of New York sustaining the legislative authority under the Constitution of the State of New York to enact the statutory provisions herein involved is final and not open to review. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937). Moreover, the Guaranty Clause is non-justiciable. *Luther* v. *Borden*, 48 U. S. (7 How.) 1 (1849); *O'Neill* v. *Leamer*, 239 U. S. 244, 248 (1915); *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262 (1915); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79-80 (1930); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937).

In any event, we do not believe we need labor the point that a statutory plan whereby responsible officers of representative organizations interested or active in education are called upon to render a public service of nominating a list of exceptionally qualified persons from whom the elected Mayor of the City of New York can make appointments to the City Board of Education involves or in anywise affects or destroys the republican form of government of the State of New York.

**(2)**

The petitioners' contention that the statute denies them the equal protection of the laws is similarly without merit. As was hereinabove pointed out, *supra*, page 6, the petitioners have not been barred from or held ineligible for consideration for or appointment as school board members in accordance with the newly devised method of selection and appointment of board members. Surely, the petitioners cannot predicate a claim of unconstitutionality solely on the fact that they did not receive appointments.

## CONCLUSION

**The Petition should be denied.**

September 20, 1962.

Respectfully submitted,

LEO A. LARKIN,
*Attorney for Respondent Wagner*

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
*of Counsel.*

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ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
*Respondents.*

## PETITIONERS' REPLY

Petitioners respectfully request filing of this Reply to the briefs filed on behalf of both respondents.

### As to Whether Federal Questions Raised are Moot

The term of petitioner Rank was not set to expire until 1964, and the mere circumstance that the term of petitioner Lanza was set to expire in 1962, does not render the Federal questions raised moot.

### All Federal Questions were Raised in Courts below

The Federal questions raised are these:

(A) Whether the New York State Statute violates Article 1, § 10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any Bill of Attainder.

(B) Whether said New York State Statute violates Article 4 of the Constitution of the United States, insofar as said Article provides that the United States shall guarantee to every State a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV, § 1, of the Constitution of the United States, insofar as said Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Respondents concede that questions (A) and (C) were properly raised in the Courts below. Respondents erroneously contend that question (B) was not raised in the Courts below.

The simple fact is that all three opinions in the Court of Appeals treat with the question (B)—that is whether the legislation constituted a valid or invalid delegation of power to "private" persons, in "private" associations.

The question as to whether the legislation was valid or invalid, because of the delegation of the power to appoint to public office, to "private" persons is a broad question. Whether the power to appoint to public office, is in the nature of an executive function, as claimed by respondents, rather than in the nature of a legislative function is beside the point.

In a Republic the power which the people have vested in either the executive, the judiciary or the legislature, may not be delegated to "private" persons, who happen to be officers of "private" organizations.

This is the broad Federal question presented, and obviously the Court of Appeals of the State of New York, treated with the broad question of whether in a Republic, the legislature may delegate its functions, rather than the narrow question as to whether that may be done under a specific provision of the New York State Constitution.

The majority opinion in the Court of Appeals, cites 22 cases, all from other jurisdictions; as to this phase of the case, in support of the conclusion reached that the legislation was valid. Obviously these 22 cases from jurisdictions other than New York State, could have considerable bearing on the broad question as to whether in a Republic, there may be delegation to appoint to public office, to "private" persons, but very little bearing on the narrow question as to whether the legislation was valid under a specific provision of the New York State Constitution.

In short, petitioners contend that in a Republic, the power to appoint to public office, whether an executive function, or a judicial function, or a legislative function, or perhaps a "mixture" of such functions, may not be delegated to "private" persons, who happen to be officers of "private" organizations. Petitioners raised this contention, in all of the Courts below.

## CONCLUSION

**Petitioners respectfully pray that a Writ of Certiorari issue, as requested in their petition, and for such other relief as is appropriate.**

Respectfully submitted,

VITO F. LANZA,
*Attorney for Petitioners,*
32 Court Street,
Brooklyn 1, New York.

SAMUEL SHAPIRO,
*of Counsel.*